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No. 390.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ISAAC S. MORELAND,

Appellant,

vs.

J. SAM BROWN, as Receiver of the First National Bank of Helena,

Appellee.

TRANSCRIPT OF RECORD.

Appeal from the United States Circuit Court, for the District of Montana.

INDEX.

In the United States Circuit Court of Appeals, for the Ninth Circuit.

ISAAC S. MORELAND,
Complainant and Appellant,

vs.

J. SAM BROWN, as Receiver of the First National Bank of Helena, Montana,
Defendant and Respondent.

Stipulation as to Printing.

It is hereby stipulated by and between the parties above named by their counsel, respectively, that the clerk of this court shall print only the original complaint, and demurrer thereto; the amended bill herein, the demurrer thereto, the decree of the court, the notice of appeal and the allowance thereof, the assignment of errors, together with proceedings had herein and all orders made by the court in this cause, including the order of the court sustaining the demurrer of the defendant to the amended

bill, comprising pages to of the certified record herein, and that the cause may be heard upon such printed record; the parts of the record not to be printed under this stipulation embracing the summons from the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clarke, and the petition for the removal of the cause on behalf of the defendant to the Circuit Court of the United States in and for the District of Montana, with the bond and order removing the cause, and also the citation and bond on this appeal.

Helena, Montana, July 14, 1897.

RICHARD R. PURCELL, and
THOMAS J. WALSH,
Solicitors for Appellant.
TOOLE & WALLACE,
Solicitors for Respondent.

In the District Court of the First Judicial District, of the State of Montana, in and for the County of Lewis and Clarke.

ISAAC S. MORELAND,
Plaintiff,
vs.
E. D. EDGERTON, as Receiver of the First National Bank of Helena, Montana,
Defendant.

Complaint.

The plaintiff above named complains to the court, and alleges:

I. That the First National Bank of Helena, Montana, is a corporation organized under the laws of the United States in reference to national banks; that on the third day of September, 1896, it suspended operations, being insolvent, and that thereafter, on or about the 15th day of October, 1896, the said defendant was, by the comptroller of the currency, duly appointed the receiver thereof.

II. Plaintiff further avers that on the 31st day of August, 1896, there was due the plaintiff from one Thomas Anderson of the city of New York, the sum of $2,635.00, which on said date, the said Anderson, by agreement with plaintiff, deposited in the First National Bank of New York City, to be, by the said bank, transmitted and paid to plaintiff.

III. That the said First National Bank of New York forthwith telegraphed to the First National Bank of Helena, Montana, on said 31st day of August, 1896, to pay the said sum of $2,635.00 to the plaintiff and charge the same to the account of the said First National Bank of New York; that plaintiff, being advised of the said direction so received by the said First National Bank of Hel-

ena, Montana, called at the said bank and demanded payment of said sum, but that said bank refused to give the plaintiff anything in payment of the said sum except exchange drawn by it upon the said First National Bank of New York, which plaintiff refused to accept; that the said bank likewise requested of plaintiff that he permit the said sum to be placed to the credit of his account with the said First National Bank of Helena, Montana, with which request plaintiff likewise refused to comply; and that after further protracted negotiations, the plaintiff that at all times demanding the immediate payment of the said sum in cash, the said bank peremptorily declined to give the plaintiff anything except exchange on New York; that finally plaintiff accepted of the said First National Bank of Helena, Montana, a draft drawn by it on the First National Bank of New York, with the express reservation on his part at the time, declared to the said bank, that he should consider it as payment only in the case said draft was duly honored.

IV. And plaintiff further avers that the said draft was forthwith transmitted to the First National Bank of New York, and payment of the same by it was refused for the reason, as the fact was, that the said First National Bank of Helena, Montana, had closed its doors and suspended prior to the presentation of the said draft for payment to the said First National Bank of New York.

V. And plaintiff further avers that immediately upon the payment of the said sum to the said First National

Bank of New York, by the said Anderson, the said bank placed the same to the credit of the account of the First National Bank of Helena, Montana, marking the entry thereof on its books as on account of plaintiff; and plaintiff further avers that at the time of the suspension of the said First National Bank of Helena, Montana, it had to its credit upon the books of the First National Bank of New York about $11,000.00.

That it was at that time obligated to the said First National Bank of New York in an amount equal to about $15,000.00 to secure the payment of which the said First National Bank of New York held collateral security of the First National Bank of Helena, Montana, amounting to the face value of upwards of $100,000.00; that subsequent to the appointment of the defendant as receiver as aforesaid, by the advice and permission of the comptroller of the currency, he paid to the said First National Bank of New York a sum equal to the difference between the amount for which said collateral was held and the amount to which the said First National Bank of Helena was credited by the said First National Bank of New York including the sum so as aforesaid paid it on account of plaintiff to-wit, about $4,000.00, and thereby procured the said collateral to be released and turned over to defendant, out of which the said defendant has, since the same was so turned over to him as aforesaid, realized a sum largely in excess of the amount paid to the said First National Bank of New York as aforesaid.

VI. And plaintiff further avers that prior to the commencement of this action he duly demanded of the defendant that he pay plaintiff the said sum of $2,635.00, the plaintiff offering at the same time to surrender to the defendant the said draft so as aforesaid made in his favor on the said First National Bank of New York by the said First National Bank of Helena, but the defendant refused and still refuses to pay said sum or any part thereof; and the plaintiff hereby offers to surrender the said draft into court and deliver the same up to defendant.

Wherefore, plaintiff demands judgment that the said defendant as receiver of the said First National Bank of Helena, Montana, be required by this court to pay to the plaintiff the said sum of $2,635.00; that plaintiff recover his costs herein, and that he have such other and further relief as to the court may seem just.

R. R. PURCELL &
T. J. WALSH,
Attorneys for Plaintiff.

State of Montana,
County of Lewis and Clarke. } ss.

Isaac S. Moreland, being duly sworn says that he is the plaintiff above named; that he has read the foregoing complaint, and that the matters and facts stated therein are true to his own knowledge, except as to such as are

therein stated on information and belief, and as to such he believes it to be true.

ISAAC S. MORELAND.

Subscribed and sworn to before me this 25th day of November, 1896.

T. J. WALSH,

Notary Public in and for Lewis and Clarke County, State of Montana.

[Endorsed]: Filed, Nov. 28, '96. Jess C. Ricker, Clerk. By Geo. E. Bayha, D. C.

In the District Court of the First Judicial District of the State of Montana, in and for the County of Lewis and Clarke.

ISAAC S. MORELAND,
Plaintiff,
vs.
E. D. EDGERTON, as Receiver of the First National Bank, of Helena, Montana,
Defendant.

Demurrer.

Now comes the defendant, E. D. Edgerton, as receiver of the First National Bank of Helena, Montana, in the

above-entitled action and demurs to the plaintiffs complaint therein, and for cause shows:

I. That said complaint does not state facts sufficient to constitute a cause of action.

TOOLE & WALLACE,
Attorneys for Defendant.

[Endorsed]: Filed, Jany. 13th, 1897. Finlay McRae, Clerk. By Jas. Gilchrist, D. C.

And thereafter, to-wit on the 27th day of April, 1897, an order was duly made which is entered on final record as follows, to-wit:

United States Circuit Court, District of Montana.

I. S. MORELAND,

vs.

E. D. EDGERTON, as Receiver of the First National Bank of Helena, Montana. } No. 466.

Order Sustaining Demurrer.

16th day April term A. D. 1897, Tuesday the 27th day of April 1897. In open court.

This cause came on regularly for hearing this day on demurrer to complaint, T. J. Walsh, Esq. appearing as

counsel for plaintiff and Wm. Wallace, Jr., Esq., appearing as counsel for defendant, and after argument of counsel demurrer submitted, and after due consideration, it is ordered that said demurrer be and the same hereby sustained, and thereupon plaintiff granted ten days in which to amend complaint.

And thereafter, to-wit, on the 10th day of May, 1897, an order was duly made which is entered on final record as follows, to-wit:

United States Circuit Court, District of Montana.

I. S. MORELAND,

vs.

E. D. EDGERTON, as Receiver of the First National Bank of Helena, Montana,

No. 466.

Order Substituting Party Defendant.

24th day of April term, A. D. 1897, Monday, the 10th day of May, 1897. In open court.

On motion of counsel for plaintiff, said plaintiff is hereby granted leave to substitute as party defendant herein J. Sam Brown as receiver of the First National Bank of Helena, Montana, in place and stead of E. D. Edgerton as

receiver, and thereupon plaintiff granted leave to file amended bill of complaint.

And thereafter on said 10th day of May, 1897, complainant herein filed his amended bill in equity which is entered on final record as follows, to-wit:

In the Circuit Court of the United States, Ninth Judicial District, in and for the District of Montana.

ISAAC S. MORELAND,
Complainant,
vs.
J. SAM BROWN, as Receiver of the First National Bank of Helena, Montana,
Defendant.

Amended Bill of Complaint.

To the Judges of the Circuit Court of the United States, for the District of Montana:

Your orator, Isaac S. Moreland, by leave of Court first had and obtained, files this, his amended bill, against the above named J. Sam Brown, as receiver of the First National Bank, of Helena, Montana, and says:

I.

That the First National Bank, of Helena, Montana, is a corporation organized under the laws of the United States in reference to national banks; that on the 3rd day of September, 1896, it suspended operations, being insolvent, and that thereafter, on or about the 15th day of October, 1896 one E. D. Edgerton was, by the comptroller of the currency, duly appointed the receiver thereof.

II.

Your orator further avers that on the 31st day of August, 1896, there was due your orator from one Thomas Anderson, of the city of New York, the sum of $2,635.00, which on said date, the said Anderson, by agreement with your orator deposited in the First National Bank, of New York City, a corporation organized under the laws of the United States in reference to national banks, to be by the said bank transmitted and paid to your orator.

III.

That the said First National Bank of New York, forthwith telegraphed to the First National Bank of Helena, Montana, on said 31st day of August, 1896, to pay the said sum of $2,635.00 to your orator and charge the same to the account of the said First National Bank, of New

York; that your orator being advised of the said direction, so received by the said First National Bank, of Helena, Montana, called at the said bank and demanded payment of said sum, but that the said bank refused to give your orator anything in payment of the said sum, except the exchange drawn by it upon the said First National Bank, of New York, which your orator refused to accept; that the said bank likewise requested your orator that he permit the said sum to be placed to the credit of his account with the said First National Bank, of Helena, Montana, with which request your orator likewise refused to comply; and that after further protracted negotiations, your orator at all times demanding the immediate payment of the said sum in cash, the said bank peremptorily declined to give your orator anything except exchange on New York; that finally your orator accepted of the said First National Bank, of Helena, a draft drawn by it on the First National Bank, of New York, with the express reservation on his part at the time, declared to the said bank, that he should consider it payment only in case the said draft was duly honored.

IV.

And your orator further avers that the said draft was forthwith transmitted to the First National Bank, of New York, and payment of it was refused for the reason, as the fact was, that the said First National Bank, of Helena, Montana, had closed its doors and suspended

prior to the presentation of the said draft for payment to the said First National Bank, of New York.

V.

And your orator further avers that immediately upon the payment of the said sum to the said First National Bank, of New York, by the said Anderson, the said bank placed the same to the credit of the account of the First National Bank, of Helena, Montana, marking the entry thereof on its books as on account of your orator. And your orator further avers that at the time of suspension of the said First National Bank, of Helena, Montana, it had to its credit upon the books of the First National Bank, of New York, about $11,000.00; that it was at that time obligated to the said First National Bank, of New York, in an amount equal to about $15,000.00, to secure the payment of which the said First National Bank, of New York, held collateral security, consisting of bills payable and other evidences of indebtedness due the said First National Bank, of Helena, amounting to the face value of upwards of $100,000.00; that subsequent to the appointment of the said E. D. Edgerton, as receiver as aforesaid, by the advice and permission of the comptroller of the currency, for the purpose of redeeming such collateral security, he paid to the said First National Bank of New York, a sum equal to the difference between the amount for which said collateral was held and the amount to which the said First National Bank, of Hel-

ena, was credited by the said First National bank of New York, including the sum so as aforesaid paid it on account of your orator, to-wit, about $4,000.00, and thereby procured the said collateral to be released and turned over to the said receiver, out of which the said defendant has, since the same was so turned over to him as aforesaid as your orator is informed and believes, realized a sum largely in excess of the amount paid to the First National Bank, of New York, as aforesaid.

VI.

And your orator further avers on information and belief that at the time the said First National Bank of New York surrendered the said collateral upon the receipt by it from the said receiver of the balance so remaining due it from the said First National Bank of Helena, it believed and supposed that the said First National Bank, of Helena,had paid your orator the amount of said draft and was justly entitled to the credit for the amount of same, so given it on the books of the said First National Bank of New York.

VII.

And your orator further avers that prior to the commencement of this action he duly demanded of the said receiver that he pay your orator the said sum of $2,635.00, your orator offering at the same time to surrender to defendant the said draft, so as aforesaid made in his favor

on the said First National Bank of New York, by the First National Bank of Helena, but that said receiver and his successor refused and still refuse to pay the said sum or any part thereof; and your orator hereby offers to surrender the said draft into court and deliver the same up to defendant.

VIII.

And your orator further avers that subsequent to the occurrence of the acts hereinbefore set out, the said E. D. Edgerton resigned as receiver of the said First National Bank, of Helena, and that the defendant was duly appointed his successor; that he qualified as such; that all effects of the said bank have been turned over to him as such receiver and that he is now acting in that capacity.

IX.

And your orator further avers that at the time the said First National Bank, of Helena, delivered the said draft to your orator it was hopelessly and irretrievably insolvent and that its being so insolvent was known to the executive officers and trustees thereof but was not known by your orator.

Wherefore, your orator prays judgment that he be decreed to have a lien upon the said collateral securities, so as aforesaid by the said receiver redeemed from the First National Bank, of New York, to the amount of $2,635.00, together with the interest thereon at the rate

of ten per cent from the 31st day of August, 1896; that said defendant be required to pay into court for the use of your orator the said sum with interest thereon as aforesaid and that your orator recover his costs herein and that he have such other and further relief as to the court may seem just.

R. R. PURCELL &
T. J. WALSH,
Solicitors and Attorneys for Complainant.

State of Montana,
County of Lewis and Clarke. } ss.

R. R. Purcell, being duly sworn, deposes and says that he is one of the attorneys for the above-named complainant and makes this verification in his behalf, that he has read the foregoing bill and knows the contents thereof; that the facts therein stated are true to the best of his knowledge, information, and belief. That the reason he makes this verification is that complainant is absent from the county of Lewis and Clarke, wherein affiant resides .

Subscribed and sworn to before me this 7th day of May, 1897.

T. J. WALSH,
Notary Public in and for Lewis and Clarke County, State of Montana.

[Endorsed]: Title of Court and Cause. Bill in Equity. Filed May 10, 1897.

And thereafter to-wit on the 7th day of June, 1897, the defendant filed his demurrer to said amended bill in equity which is entered on final record as follows, to-wit:

In the Circuit Court of the Ninth Circuit of the United States in and for the District of Montana.

ISAAC S. MORELAND,
Complainant,
vs.
J. SAM BROWN, as Receiver of the First National Bank of Helena, Montana,
Defendant.

Demurrer to Amended Complaint.

The demurrer of the above-named defendant, J. Sam Brown, as receiver of the First National Bank of Helena, Montana, to the amended bill of complaint, of the above-named plaintiff.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things, in the said bill of complaint contained, to be true, in such manner and form as the same are herein set forth and alleged, doth demur to said amended bill.

And for causes of demurrer showeth:

1. That it appeareth by the complainant's own showing by said amended bill, that he is not entitled to the relief prayed by the amended bill against this defendant.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, as amended, this defendant doth demur thereto. And he prays the judgment of the Honorable Court whether he shall be compelled to make an answer to the said amended bill; and he humbly prays to be hence dismissed with reasonable costs in this behalf sustained.

TOOLE & WALLACE,
Solicitors and Counsel of Above-named Defendant.

I hereby certify that the foregoing demurrer is in my opinion, well founded in point of law.

Dated, Helena, Montana, June 5th, 1897.

W. WALLACE, JR.
Of Counsel for Defendant.

United States of America,
District of Montana,
County of Lewis and Clarke. } ss.

J. Sam Brown being duly sworn deposes and says: I am the defendant above named. The foregoing demurrer is not interposed for delay.

.....

Subscribed and sworn to before me this 7th day of June, 1897.

.....

Notary Public in and for said Lewis and Clarke County, Montana .

Verification waived.

R. R. PURCELL &
T. J. WALSH.

[Endorsed]: Title of Court and Cause. Filed June 7th, 1897.

And thereafter to-wit on the 24th day of June, 1897, an order was made sustaining said demurrer which said order is entered on final record as follows, to-wit:

United States Circuit Court, District of Montana.

I. S. MORELAND,

vs.

J. SAM BROWN, as Receiver of the First National Bank, of Helena, Montana. } No. 466.

Order Sustaining Demurrer.

51st day, April term A. D. 1897, Thursday, the 24 day of June, A. D. 1897. In open court.

This cause came on regularly for hearing this day on

demurrer to bill of complaint, and after argument of counsel demurrer submitted to the court, and after due consideration it is ordered that said demurrer be and the same hereby is sustained.

And thereupon decree in favor of defendant ordered entered for dismissal of action and costs.

And thereafter, to-wit on the 30th day of June, A. D. 1897, a final decree was duly signed, which said final decree is entered on final record as follows, to-wit:

In the Circuit Court of the United States, Ninth Circuit District of Montana.

ISAAC MORELAND,
Complainant,
vs.
J. SAM BROWN, Receiver,
Defendant.

Decree of Dismissal.

Be it remembered, that the above action having come on for judgment upon the sustaining of defendant's demurrer to the amended complaint, plaintiff having elected to stand upon his amended complaint, defendant having moved for judgment, it is therefore ordered and adjudged that said bill of complaint be dismissed; that complainant

be dismissed out of court without day and take nothing by his said bill, and that defendant recover his costs herein taxed at ($38.80) thirty-eight 80-100 dollars.

Signed and passed in open court this 30th day of June A. D. 1897.

HIRAM KNOWLES,
Judge.

[Endorsed]: Title of Court and Cause. Decree. Filed and entered June 30th, 1897. Geo. W. Sproule, Clerk.

And thereafter, to-wit on the 14th day of July, 1897, the notice of appeal herein and allowance thereof was duly filed as follows, to-wit:

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Montana.

ISAAC S. MORELAND,
Complainant,
vs.
J. SAM BROWN, as Receiver of the First National Bank of Helena, Montana,
Defendant.

Notice of Appeal.

The above complainant Isaac S. Moreland, conceiving himself aggrieved by the decree herein entered by the Circuit Court of the United States, in and for the District of Montana, on the 30th day of June, 1897, dismissing the bill of complaint of the complainant and adjudging that he take nothing by his action, and for costs to the defendant, do hereby appeal from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, and he prays that this, his appeal, may be allowed; and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated may be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Helena, Montana, July 8, 1897.

RICHARD R. PURCELL and
THOMAS WALSH,
Solicitors for complainant.

And now to-wit on the 12th day of July, 1897, it is ordered that the appeal be allowed as prayed for.

HIRAM KNOWLES,
Judge presiding.

Due personal service of the foregoing notice of appeal, this 14th day of July, 1897, hereby admitted.

TOOLE & WALLACE,
Solicitor for Defendant.

[Endorsed]: Title of Court and Cause. Notice of Appeal. Filed July 14, 1897. Geo. W. Sproule, Clerk.

And thereafter, to-wit on the 8th day of July, 1897, the petition for appeal and assignment of error was filed here in in the words and figures as follows, to-wit:

Petition for Appeal.

United States of America,
District of Montana. } ss.

To the Honorable Justices of the United States Circuit Court of Appeals, for the Ninth Circuit:

And now comes Isaac S. Moreland, by his solicitors, Richard R. Purcell and Thomas J. Walsh, and complains hat in the records and proceedings, and also in the rendition of the decree in a suit between the said Isaac S. Moreland, complainant, and J. Sam Brown, as receiver of the First National Bank of Helena, Montana, heard in and before the United States Circuit Court, in and for the District of Montana wherein a decree was by the said court rendered and entered on the 30th day of June, 1897, in favor of the defendant therein, the said J. Sam Brown, as receiver of the First National Bank of Helena, Montana, manifest error hath intervened to the great damage of the said Isaac S. Moreland.

Wherefore he prays for the allowance of an appeal and such other process as may cause the same to be corrected

by the United States Circuit Court of Appeals for the Ninth Circuit aforesaid.

RICHARD R. PURCELL and
THOMAS J. WALSH,
Solicitors for the said Complainant Isaac S. Moreland

The appeal in the above cause allowed as prayed for this the 12th day of July, 1897.

HIRAM KNOWLES,
Judge.

In the Circuit Court of the United States, in and for the District of Montana.

ISAAC S. MORELAND,
Appellant,
vs.
J. SAM BROWN, as Receiver of the First National Bank of Helena, Montana.
Respondent.

Assignment of Errors.

1. It was error in the court to sustain the demurrer of the respondent to the amended bill herein.

2. It was error in the court to render a decree herein in favor of the respondent adjudging that the appellant

take nothing by his suit and for costs to the respondent, or any decree whatever in favor of the said respondent.

RICHARD R. PURCELL and
THOMAS J. WALSH,
Solicitors for appellant.

[Endorsed]: Title of Court and Cause. Petition and Assignment of Errors. Filed July 8, 1897. Geo. W. Sproule, Clerk.

In the Circuit Court of the United States, Ninth Circuit, District of Montana.

United States of America.
District of Montana. } ss.

Clerk's Certificate to Transcript.

I, George W. Sproule, clerk of the United States Circuit Court, Ninth Circuit, District of Montana, do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 36 pages, numbered consecutively from 1 to 36 inclusive, is a true and correct transcript of the pleadings, process, records, orders, and decree and other proceedings had in said cause, and of the whole thereof, as appear from the original records and files of said court in my custody; and I further do certify

and return that I have annexed to said transcript, and included within said paging the original citation.

I further certify, that the costs of the transcript of record amounts to the sum of $11.50, and that the same has been paid by the appellant.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 28th day of July, A. D. 1897.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 390. United States Circuit Court of Appeals for the Ninth Circuit. Isaac S. Moreland, Appellant, v. J. Sam Brown, as Receiver of the First National Bank of Helena, Appellee. Transcript of Record. Appeal from the United States Circuit Court for the District of Montana.

Filed Aug. 2, 1897.

F. D. MONCKTON,
Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ISAAC S. MORELAND,
Appellant.

vs.

J. SAM BROWN, as Receiver of the First National Bank of Helena,
Appellee.

APPELLANT'S BRIEF.

RICHARD R. PURCELL and THOMAS J. WALSH,
Solicitors for Appellant.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

ISAAC S. MORELAND,
Appellant.

vs.

J. SAM BROWN, as Receiver of the First National Bank of Helena,
Appellee.

APPELLANT'S BRIEF.

This case comes to this court on appeal from the decree of the Circuit Court of the Ninth Judicial Circuit in and for the District of Montana, entered upon the order of that court sustaining the appellee's general demurrer to the appellant's amended bill of complaint.

The First National Bank of Helena, a national banking institution, closed its doors and suspended business hopelessly and irretrievably insolvent on September 3, 1896. On August 31, 1896,

the appellant had due him from one Anderson, then in New York City, $2,635. By agreement between appellant and Anderson, the latter on that day deposited the amount named, in payment of his obligation to appellant, in the First National Bank of New York, to be by it transmitted to appellant. The New York bank immediately placed this amount to the credit of the First National Bank of Helena and telegraphed the latter to pay a like sum to appellant. Appellant being advised of this direction, called on the First National Bank of Helena and demanded payment, but that bank refused to give him anything in payment except exchange drawn by it on the First National Bank of New York. This appellant refused to take. The Helena bank then requested that he allow it to place the amount to the credit of his account with it. This he likewise refused. After protracted negotiation, appellant at all times demanding payment to him in cash, and the bank finally peremptorily refusing to give him anything except exchange on New York, he took a draft drawn by the First National Bank of Helena on the First National Bank of New York, with the express reservation declared to the bank at the time, however, that he should consider it as payment of the amount due him only in case it was duly honored.

At this time the bank was insolvent as before recited, and it was known by its officers to be so. The draft was immediately forwarded for payment, but payment was refused because the drawer had suspended.

At the time of the suspension of the Helena bank, it had to its credit on the books of the New York bank, including the credit placed there on account of the money of appellant applied by the

latter bank to the credit of the account of the Helena bank, about $11,000. It was at the same time obligated to the New York bank to the amount of about $15,000, and to secure this indebtedness the New York bank held collateral notes and other securities pledged with it by the Helena bank, the face value of which was about $100,000.

After a receiver of the suspended bank had been appointed, under the advice and permission of the Comptroller of the Currency, he redeemed these collaterals by paying the New York bank the difference between the amount with which the Helena bank stood credited on its books (including the credit on account of appellant's money), and the amount to which it was obligated and for which the collaterals were peldged, and thus procured the securities to be released and turned over to him, the receiver, the New York bank supposing that the Helena bank had paid appellant pursuant to its telegram. Out of these collaterals the receiver obtaining them, and the appellee, his successor, substituted as defendant, has realized more than the amount paid to redeem them.

The appellee, under these circumstances, asks that he be decreed to have a lien upon the collaterals so redeemed to the amount of $2,635 and interest, and that the appellee be required to pay into court that amount to his use.

That he is entitled to this relief seems perfectly clear, either under the doctrine of the right to follow trust funds or the doctrine of equitable assignment or subrogation.

That the relation of debtor and creditor never existed between

appellant and either of the banks as to these funds must be conceded. The title to them at all times remained in the appellant.

Montagu vs. Pacific Bank, 81 Fed. 602.

First National vs. Armstrong, 36 Fed. 59.

They were used by the two banks, or rather by the New York bank and the receiver, in paying off a secured indebtednes due from the Helena bank to the New York bank. Practically the money was used in the purchase by the receiver of the equity of redemption which the Helena bank had in the collaterals.

The rule that when the money for a purchase is furnished by one and the title taken in the name of another a trust arises in the property purchased in favor of the former is, of course, well established.

Perry on Trusts, 126.

Pomeroy's Equity Jurisprudence, 1037.

If the transaction is carried on with the knowledge and assent of the owner of the funds the trust is "resulting"; if the funds are applied by a person holding them in a fiduciary capacity in violation of the trust under which he holds them, it is called "constructive."

Perry on Trusts, 127.

Pomeroy's Eq. Juris., 1037, note, 1051.

So if a thief steals my money and converts it into some other form of property a trust arises in such property in my favor.

Newton vs. Porter, 69 N. Y. 133.

Bank vs. Barry, 125 Mass. 20.

Or if my servant embezzles it.

Wells vs. Robinson, 13 Cal. 133.

Whenever one puts the money of another into property the trust arises.

Nebraska Bank vs. Johnson, 71 N. W. 294.
Beck vs. Uhrich, 13 Pa. St. 636.

The rule is not confined to real estate, but embraces personal property as well, bonds, annuities, stocks, mortgages or other personal interests.

Perry on Trusts, 130.

It is but an application of this principle to hold that when a thief steals money or an agent embezzles it and uses it in paying off a mortgage on his house, the mortgage is kept ailve in equity and is held to be assigned to the person whose funds were used in paying it off.

In Greiner vs. Greiner, 58 Cal. 115,
the defendant had used funds of his wife, the plaintiff, in paying off an indebtedness at a bank to secure which it held certain notes secured by mortgages which he had pledged as collateral. He then transferred them to other defendants, not bona fide purchasers, and the court held that she had a lien upon the securities to the amount to which her money had been applied to redeem them at the bank.

It is absolutely impossible to distinguish in any way this case from the one at bar. It is rare that a precedent so fully meets the case presented.

The case of

Oury vs. Saunders, 13 S. W. 1030,

is equally conclusive upon the equity of the bill. In that case a

guardian purchased a piece of real estate which became his homestead and gave his notes for it. Under the law of Texas the vendor had a lien upon the property for the unpaid purchase money. The purchaser afterwards used the money of certain wards whose guardian he was, in paying off his notes. It was held that the wards were subrogated to the rights of the vendor and could enforce his lien against the property.

This right of subrogation has been most liberally applied by the courts in more recent years whenever necessary to promote justice.

A leading author says it is broad enough to include every instance in which one not a mere volunteer pays a debt for which another is primarily answerable, and which, in equity and good conscience, should have been discharged by the latter.

Sheldon on Subrogation, 1.

Subrogation takes place when a debt due from one is paid out of a fund belonging to another.

24 Am. & Eng. Ency., 189, note.

And in case the money of one is used to discharge claims against a trust estate he is substituted to the rights of the holders of such claims before their payment in order to effect justice.

Hines vs. Potts, 56 Miss. 346-350.

So a purchaser at a void trustee's sale is subrogated to the rights of the creditors if his money has gone to pay off their claims.

Harris on Subrogation, 37.

And so a purchaser at a void administrator's or guardian's sale, or a void execution sale.

Harris on Subrogation, 51 et seq.

In

Wehrle vs. Wehrle, 39 Oh. St., 365-368,

the right of subrogation in these cases is expressly put upon the ground that the money of the party asking relief has been applied to the payment of the debts of the estate.

Subrogation is also allowed in equity in order to accomplish a result always desirable in any court and particularly sought after in equity, the avoidance of multiplicity of suits or circuity of action.

Fellows vs. Fellows, Cow. 682-699.
Hampton vs. Phipps, 108 U. S. 260.
Smith vs. Wyckoff, 11 Paige 49.

With this end in view equity permits a creditor to proceed directly to enforce collaterals held by a surety for his indemnity.

Colebrook on Collateral Securities, 217,

instead of compelling the creditor to proceed against the surety and then requiring the latter to resort to his collaterals.

We may, appellee will admit, go to New York and recover our money of the bank there. It having let the collaterals go under the belief that the Helena bank had paid appellant, may then come to Montana and re-establish its lien upon these collaterals upon plain equitable grounds and have them subjected for its reimbursement. It would be a reproach to the adminisrtation of equity, if each of these two sufferers were compelled to wander across the continent, each seeking a foreign jurisdiction, and vex the courts

with two suits, when the whole controversy can be disposed of in this one action—prosecuted in the jurisdiction within which both of the parties reside.

The same result is reached if we follow this money as a trust fund. All that is necessary is, according to the rule established by this court, that the claimant must be able to show that his property either in its original or in a substituted form is in the hands of the defendant.

Spokane Co. vs. First N. B., 68 Fed. 979-982.

Or, as it is expressed in the opinion of the court in the same case, "if the estate has been thereby increased or better prepared to meet the demands of creditors," reimbursement is proper.

If the New York bank had turned the money over to the Receiver there is no doubt that we could recover it of him.

Com. Nat. vs. Armstrong, 148 U. S. 50.

Nurse vs. Satterlee, 46 N. W. 1102.

If it had given the Helena bank a certificate of deposit and this *chose* had come into the hands of the receiver we could have compelled him to surrender it to us. If he had turned in this certificate and $4,000 in cash and thus redeemed the collateral, what doubt would there be about the appellant's right to a lien upon them? If instead of a certificate of deposit a mere receipt for the money, or some other non-negotiable paper, had been given the Helena bank, and this had been turned in by the Receiver to release the collateral, the situation would not be changed.

The credit on the books of the New York bank produced by the

payment to it of appellant's money was availed of by the receiver in exactly the same manner as would have been the cash, the certificate of deposit, the receipt or the I. O. U. of the New York bank in the cases supposed.

By the transaction between these banks, the New York bank became indebted to the Helena bank in the sum of $2,635. If, in following the property in its transmutations, a debt from one to another is reached, such a debt is "substituted property."

Morse on Banks, 565, note.

The credit served all the purposes of so much cash in the hands of the receiver to effect the redemption. The amount of money necessary to be paid by him to redeem was reduced just so much.

"The estate has been thereby increased or better prepared to meet the demands of creditors."

Spokane Co. vs. F. N. Bank, supra.

The case of

Thuemmler vs. Barth, 62 N. W. 94,

approaches very closely to a determination of the exact question involved in this case. In that proceeding the failing bank had received a note for collection. It sent the note to a correspondent bank to which it was indebted with instructions to collect and credit to the account of the sending bank, which was done. The collecting bank held a large amount of collateral pledged with it by the failing bank. The owner of the note brought suit against the receiver of the failed bank, claiming that the collateral (assets of the failed bank) had been relieved from the charge against them to the amount of the note and the estate benefitted to that extent. His prayer was denied because it did not appear that the receiver

had exercised his option to redeem the collateral. It is fairly inferable from the opinion that had he done so the plaintiff would have established a trust in the securities.

On no just or equitable grounds can the general creditors of this bank claim the benefit of the appellant's money for the redemption of these collaterals. The bill avers that they have collected out of them all that they were required to pay to get them. They have no right to them except upon the payment of what was really owing to the New York bank by the Helena bank. They were legitimately subject to a charge in the hands of the New York bank to the amount of $6,635, and the general creditors have no just cause of complaint if they are not premitted to profit out of them until that amount is made. It would not be good morals or good law to allow them to retain the advantage they have gained at the expense of the appellant, by reason of the error of the New York bank in supposing that his claim was paid.

By an affirmance of the judgment herein, "the appellant will be deprived of his own, and the general creditors will receive that to which they have no right."

Standard Oil Co. vs. Hawkins, 74 Fed. 395-402.

The court will require the receiver to act under the circumstances not as the law would permit an ordinary litigant, but, being the trustee of the court, as would a high-minded man.

Id.

Respectfully submitted,

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Solicitors for Appellant.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ISAAC S. MORELAND,

Appellant,

vs.

J. SAM BROWN, as Receiver of the First National Bank of Helena,

Appellee.

APPELLEE'S BRIEF.

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ADDITIONAL STATEMENT.

The New York bank not only undertook that the $2,635 should be transmitted, but that it should be "paid" plaintiff. (p. 11, line 15.) It was neither transmitted nor paid, but, aside from the book entry credit, the money itself remained in the New York bank, and is still there, unless withdrawn by the Receiver's contract.

There was no privity between plaintiff and the Helena bank; it was not selected by plaintiff as his agent to receive, and had no connection with the

transaction, except as the New York bank itself passed this credit to it. At the time the New York bank telegraphed the order of payment it had no funds in the Helena bank. The New York bank is perfectly solvent; undisputedly plaintiff has a complete cause of action against it, so that he is in no danger of ultimate loss, while if he takes from the New York bank, the creditors of this bank do not suffer by a diminution of the trust assets. The $15,000 debt of the Helena to the New York bank was a distinct debt, entirely separate from the open account which showed the $11,000 credit balance at time of former suspension. It does not appear that there was in this open account *continuously* from and after Aug. 30th to Sept. 4th, a credit balance equal to or greater than $2,635. As to this contract, it is only charged that "for the purpose of redeeming such collateral" the Receiver paid the New York bank a sum, "to-wit, about $4,000; * * * * * * and thereby procured the said collateral to be released and turned over" to him; and while it is averred that the sum paid over was equal to the difference between the collateral debt and the credit balance in the deposit account (p. 13, 14), it is not alleged that the $15,000 debt was fully paid or the credit balance extinguished—merely that the collateral was released and turned over. It is not alleged that either the Receiver when he bargained, or the Comptroller when he authorized, the contract, to pay $4,000 of the trust moneys to release the collateral, *knew* that

the $11,000 credit balance in the New York bank contained plaintiff's $2,645, or that they knew anything about the credit balance at all. So far as appears, the New York bank may have written and offered to surrender its lien on that collateral for a fixed sum named by it. which it may have arrived at in its own way, and the Receiver may have accepted the offer and paid the money asked and taken the collateral; and so the credit balance may never have been spoken of by either party in making this contract, so far as any allegation in the pleading is concerned.

The *actual* value of the collateral is not averred.

It is not charged that the belief of the New York bank that the Helena bank had paid plaintiff was the *moving* cause of its making the contract of release; or that but for such belief it would not have taken the $4,000 of the Receiver or released the collateral; or that this mistake of fact was without negligence on its part. The original and amended complaint are substantially alike, except that paragraph VI. of amended, was not in the original complaint. But there was an utter change in the theory of the nature of plaintiff's right, the former asking for a direct judgment for $2,635 against the Receiver; the latter only asking for a lien on the collateral in his hands.

ARGUMENT.

Plaintiff justifies his right to the relief asked

on two grounds: I. Subrogation; II. Right to follow trust funds.

I.

(*a*) Subrogation, as applied to this case, will be the right of Moreland, having a claim against the New York bank, to step into the bank's shoes and avail himself of, and enforce, any claim held by it as indemnity to itself against its obligation to plaintiff.

Sheldon, Subrogation, 2d Ed., Sec. 1.

By the acceptance of the deposit on the terms conferred, it became bound to transmit and pay; and this was its liability. The right to demand this was Moreland's claim. It must not be for a moment forgotten that under this principle of subrogation, wherever it is applicable, the person claiming it can assert no greater right than belonged to the one to whose rights he is subrogated, and it must further be remembered that the burden is on the plaintiff to show such a condition as clearly entitles him to the right.

Sheldon, Subrogation, 2d Ed., p. 16.

What right, then, had the New York bank, as against the Helena bank or its Receiver, before or after the collateral release contract? Before the contract it had the money in its own possession; it had given a mere paper credit to induce the First National to pay, which it could have annulled and erased on its books at any time. This credit was

its own obligation to pay the Helena bank; and, if availed of by subrogation, would have meant merely a right in plaintiff to compel the New York bank to pay the amount credited.

Its refusal to pay plaintiff on the wire order, which was in effect a telegraphic draft, gave no right of action to the New York bank against the Helena bank, because the former at the time of the order had no money on deposit in the latter, and the latter was not bound to pay.

National Machinery Bank vs. Peck, 127 Mass., 298.

3 Am. & Eng. Enc. of Law, p. 225.

Nor would this telegraphic order or draft, or a formal draft, even if an equal amount had actually been on deposit in the Helena bank to the New York bank's credit, have constituted an equitable assignment, so as, under principles of subrogation, to have entitled plaintiff to claim priority in the assets of the Helena bank against other creditors.

Bank vs. Yardley, 165 U. S., 643, foot, 644 top. (41 Co-Op. Ed., 861, middle).

It had no claims against the collateral in its hands in connection with this liability, because the collateral was pledged for a specific debt of fifteen thousand dollars, and could not have been held for any other.

Until the collateral release contract then, there was no right in the N. Y. bank against the Helena

except to cancel the improper credit. What right, then, had the N. Y. bank after this contract?

The receiver found a fixed account with a fixed credit balance in the N. Y. bank. It does not appear that he knew what these items in the credit balance consisted of, or that the credit balance in the account remained greater than $2,635 at all times from August 30 until September 4 (which is the essential ground on which the court bases the trust relation in 81 Federal, 602, cited by counsel. In this case too it is apparent, though it does not appear how, that the insolvent bank actually used the money before suspension.) He paid a fixed sum to release these collaterals, making the payment out of the trust moneys, with the approval of the Comptroller. The N. Y. Bank required no adjustment of this item of $2,635 due from it; accepted the sum paid in money without question and unconditionally released the collateral. The release of the collateral is not necessarily a discharge of the debt for which they are pledged (2 Pingree on Mortgages, Sec. 1228), and it is not alleged here that the debt was discharged. The N. Y. bank may have thought it wise, owing to the intrinsic value of the collateral, (their actual worth is not alleged) to release for $4,000, without demanding adjustment of the $2,635 item. On the other hand, perhaps the Receiver would not have released, nor the Comptroller authorized the release of, the collateral if he had been required to pay $6,635 instead of $4,000. If the court were now to require the Receiver to pay the addi-

tional $2,635, whether from the proceeds of the collateral or from the trust funds, it would be changing the contract and making a new one. This the N. Y. bank could not do, and therefore the plaintiff, in the right of the N. Y. bank, cannot ask. (Sheldon on Subrogation, 2d Ed., Sec. 196). If the contract as made with the N. Y. bank by the Receiver had been that, in addition to paying the four thousand dollars he should assume whatever liabilities there might be to the plaintiff on the part of the N. Y. bank, such a stipulation in the contract would have been a right belonging to the N. Y. bank which it could have enforced and which the plaintiff might have enforced in the right of the N. Y. bank for his own benefit. But no such condition is presented or pleaded here.

It is alleged that the N. Y. bank, when it released the collateral, believed the Helena bank had paid the plaintiff. This shows a mistake of fact on the part of the N. Y. bank. What right did this mistake give it? It was a unilateral mistake, because it is not alleged that the Receiver labored under the same mistake. A mistake of fact on the part of the bank alone would not authorize a court of equity to change the contract as made, but would only be ground for a recission of the contract.

Hearne vs. Mar. Ins. Co., 20 Wall., 490, (22 Co-Op. Ed., 397, left top).

Cases in 15 Am. & Eng. Enc. of Law, p. 631, left middle.

But, if the bank were bringing its own bill to rescind this contract or take advantage of this mistake, it would have to allege, First: That the mistake was *material*, or the moving cause of its action in making the contract. Second: That it was unintentional; that is, that it did not do exactly what it intended to do, having mistaken its effect; and Third: That it was free from negligence, and elected to rescind and offered to return the consideration immediately on discovery of real fact.

Grymes vs. Sanders, 93 U. S., 55. (23 Co-Op. Ed., 801, 802).

15 Am. & Eng. Enc. of Law, pp. 628, 631.

This bill simply alleges the mistake, i. e., that the N. Y. bank believed plaintiff had been paid. [Negligence, indeed, is not only negatived, but is inferentially shown by the allegation concerning the draft given plaintiff upon itself, which it dishonored afterward because of the Helena bank's suspension; and so it ought to have known then and when it made its contract with the Receiver, that the Helena bank had not paid plaintiff, and that the Helena bank could not do business after suspension or make a payment then, which it had not made before. U. S. vs. Knox, 111 U. S. 786; 28 Co-Op. Ed., 603, foot.] Failing to allege these other matters, the bill is fatally defective, viewed from the standpoint of subrogation.

Cases in Am. & Eng. Enc. of Law, p. 633, left, middle.

Romanski vs. Thompson et al., 11 So. Rep., 228, right, top.

Again, plaintiff is not asking for a rescission of this contract, for a rescission must be *in toto*. He cannot affirm the beneficial and reject the injurious parts.

21 Am. & Eng. Enc. of Law, p. 91.

He seeks to let the contract stand, so far as to leave the collateral in the Receiver's hands, which is a benefit to him, in order to hold the trust, and wishes to ignore that feature of the contract which gave the Receiver absolute title in the collateral relieved of all liens. This the N. Y. bank could not do, nor can plaintiff. Moreover, rescission never will be ordered unless the parties could be placed in the same situation as they were before.

93 U. S., 55.

Nor unless the consideration be restored fully.

Columbus R. R. Co. vs. Steinfield, 42 O. St., 449.

Most of appellant's authorities cited under this head, aside from the general definitions of subrogation and trust, assert a principle of law I do not for a moment dispute, i. e., that where a thief, or embezzler, or confidential agent converts stolen property or trust funds into other property, such other property, in the hands of either the thief or of any one else not a bona fide purchaser, will be subject to a trust for the benefit of the real owner. Of this line of authorities are cases in 69 N. Y., 125 Mass, 13 and 58 Cal., and 13 Pa. State.

In every one of these cases the confidential agent or thief had bought the other property, and such other property was in his hands, or in the hands of some one with notice. The principle might be applicable if the N. Y. bank, plaintiff's trustee and confidential agent, had used the $2,635 to pay a debt owing to the First National of Helena, and had released the collateral held by the latter for such debt, which collateral belonged to the N. Y. bank. Such collateral would undoubtedly be subject to a lien in favor of plaintiff, while in the N. Y. bank's hands, or in the hands of others, not purchasers for value without notice. Here the Receiver, who was in no wise trustee or confidential agent of plaintiff, and owed him no duty, used four thousand dollars of his own money to buy an unconditional release of collateral for his trust. He was an innocent purchaser for value of this collateral, since he was not acting in the right of the bank, and was making a new contract of his own with the creditor's funds; and the above principle can have no application to him, for he stands in the attitude of one who has parted with his property to the thief or confidential agent, and the above cases declare that the lien or trust is enforced upon the property that he has not parted with, not what he has innocently received from the thief or agent. On the other hand, even if it had been alleged that the credit of eleven thousand dollars was continuous in a sum greater than $2,635 from August 30 to September 4, was by the N. Y. bank offset against the

$15,000 debt, and both the credit satisfied in full by the Receiver and the debt in full by the bank, and the collateral released on the payment of the four thousand dollars, then the bank, which was plaintiff's confidential agent and trustee, would have used plaintiff's money and the collateral to get what it secured of the Receiver, i. e., the four thousand dollars in cash, and this cash is what the plaintiff's fund would have been converted into by his agent, the N. Y. bank, and on which, under the above rule, plaintiff could enforce his lien. This would be most plain, if, instead of paying the cash to the N. Y. bank, the Receiver had turned over to the N. Y. bank a house and lot in New York city of the value of four thousand dollars. For clearly the lien would then attach under the above authorities, to the house and lot that plaintiff's agent received, and not to what the Receiver got himself thereby. It is clear, then, that the N. Y. bank is not shown to have had, did not, and could not have any such right as would entitle it to claim any preference or trust in any assets in this Receiver's hands. If a third person had bought this collateral of the N. Y. bank for $4,000, it would be impossible to devise a theory upon which plaintiff could assert any lien against it. There being, before the contract, no connection between the deposit creditor on the bank's books and the debt of $15,000, for which the collateral was pledged, the N. Y. bank might have waived its lien altogether on the collateral and given them to

the Receiver without charge, and this would have given the plaintiff no right of action by subrogation, or otherwise against the trust, because the collateral was not security in any way for his claim or for the liability of the N. Y. bank to him.

II.

Right to follow trust funds.

Most vital to this right is the ability to trace the fund in the original or clearly equivalent form into the hands of the person to be charged and the showing that it still remains there.

"Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is, in its original or substituted form, in the hands of the defendant."

Spokane Company vs. Bank, 68 Fed., 982 foot, and cases.

Bank vs. U. S. Savings Co., 16 Southern, 111 left foot.

"The right has its basis in the right of property. It never was based upon the theory of preference, by reason of an unlawful conversion."

N. Co. vs. Flanders, 58 N. W., 385. (A well considered case, citing many authorities.)

There is no sufficient tracing of the fund.

(*a.*) To negative the possibility of its having been dissipated in the course of business between

the time of payment and suspension it must be averred, if paid direct to the bank, that during the balance of its business life it had that or a greater sum in its vaults.

68 Fed., 980, middle.

And if this is not averred, the presumption is that the contrary condition exists.

11 Southern, 828, right top, supra.

If there was a debit balance in the open account when the $2,635 was credited (and it is nowhere alleged that there was not, but only that there was a credit balance at the date of suspension) as between the two banks, the passing of this sum to the credit of the Helena bank was as much a payment as if the cash had been handed over its counter. It was a mingling of its assets, and no trust results.

Bank vs. Armstrong, 148 U. S., 50 (37 Co-Op. Ed., 148 left middle.

And so, as the payment was made into an account, it should have been alleged that there was a credit balance in the account at the time of payment, and that the credit balance remained equal to or greater than $2,635 to the date of the Helena bank's suspension, else it would have been applied directly in reduction of a debit balance, and have become, as the U. S. Supreme Court says, "a completed transaction," or it might have been dissipated in the remaining four days' business of the Helena bank, and other amounts have replaced it

to make the credit balance as alleged on the last day.

68 Fed., 982, middle.

Merchants Bank vs. Austin, 48 Fed., 25, 29 middle, 30 top, 32 top.

(*b*). It is nowhere distinctly alleged that the $15,000 debt was paid, or that plaintiff's deposit in the N. Y. bank was used to pay it. If it had been, such an equity is too weak.

"But it is the general rule * * that, in order to follow trust funds, * * they must be identified. * * The court below seems to have proceeded upon a supposed equity springing up from the circumstance that, by the application of the fund to the payment of White's creditors, the assigned estate was relieved *pro tanto* from debts which otherwise would have been charged upon it, and that thereby the remaining creditors * * will be benefited. We think it is quite too vague an equity for judicial cognizance."

Bank vs. Dowd, 38 Fed., 172, 184.

The above case was followed and approved in Com. Bank vs. Davis, 20 S. E., 370, 371; and also in Freiburg vs. Stoddard, 28 Atlantic, 1112, 1113, where the court decides, that there is a failure to trace trust funds into specific property, and says, "when the assignor charged these drafts against the accounts of the drawees he cancelled so much of his indebtedness to them, but did not add

a dollar to the fund in bank. It is true his estate was benefited by the transaction, because his indebtedness was thereby reduced. *But as he was insolvent at the time* such benefit to the estate only equalled the pro rata shares which would have been awarded to the drawees on distribution."

In a case where a check deposited for collection was used to adjust balances of the collecting bank in the clearing house, the court says: "As it was, there existed nothing but a cause of action against the bank for conversion of the check, or of the money, its proceeds; and, as such, it stands on the same footing as any other claim upon the assigned assets, based on a conversion of money or other property. To allow such claims to be paid in full out of the assets, when all claims cannot be paid in full, would give a preference to such claims. There is nothing in the insolvent law justifying it."

Westfall vs. Mullen, 59 N. W., 633, 634.

One of the fallacies of appellant lies in assuming that the Receiver used plaintiff's fund, or that his fund was traced into this collateral. The Receiver had no control over that fund; never had assumed or exercised it; the money was in the New York bank; the bank was liable to the plaintiff; was his confidential agent. If plaintiff had sued the N. Y. bank, and the latter had paid the judgment, it would hardly be contended that it could, by reason thereof, have any preferential claim against

this trust; so there is no equity in letting this preference be worked out in this remarkable manner for the benefit of the N. Y. bank at the expense of the general creditors of this insolvent bank, many of whom are doubtless depositors after August 30th, but, who yet could not establish a preference for themselves, unless the insolvency then existing was known to its officers—a fact not existing, because not alleged in this case.

48 Fed., 32, top.

(*c.*) So all deposits with bankers must fall within one of two classes---general or special. Under the custom of banks, Anderson and plaintiff understood that the transmittal and payment under the contract, would not be of specific moneys deposited, but that they would be mingled with the general funds of the N. Y. bank and used, and an equivalent amount paid through a correspondent bank. This then would constitute a mingling of the funds, a loss of their identity so as to prevent a tracing or following as a trust.

148 U. S., 59 foot, 60 top, (37 Co-Op. Ed., 367 right).

Bank vs. Beal, Receiver, 49 Fed., 606.

See also, Sayles vs. Cox, 32 S. W., 626, 627 right top, (which also shows that the allegation of insolvency is immaterial, even where the insolvent bank is the confidential agent or collecting bank.)

(*d.*) Appellant has not alleged any *actual*

knowledge on the part of the Receiver. His contention, then, must be, that knowledge is immaterial. Were this upheld, it would follow that, if the $4,000 received from the Receiver were deposited to the account of John Jones, an innocent customer of the New York bank, who checked it out in a single check to Smith, of Nevada, in payment of a mine, plaintiff could claim a lien on the mine, or follow the proceeds through Smith's hands indefinitely; or, if the Receiver of this bank had in turn exchanged the collaterals or any part of them for any property, plaintiff could hold the other property, any or all of it, or anything into which it was exchanged, or follow the collateral or its proceeds indefinitely, into all hands and in all directions. Such a condition would be a commercial, legal, and equitable impossibility, and the contention cannot stand.

Of cases cited by appellant, the Nurse-Satterlee case would only sustain an endeavor on the part of plaintiff to enforce a trust against the assets of the N. Y. bank, if in the hands of a receiver of that bank—for Satterlee was the receiver of the collecting bank which had deposited the money elsewhere. The Barth case (62 N. W., 94), which is also a case where the insolvent bank was the collecting bank and the confidential agent of the owner of the fund, is a direct adjudication in line with 28 Atl., 68 Fed., and 59 N. W., supra, that a wrongful credit by the N. Y. bank is a conversion giving rise to a cause of action in damages, but not sufficient to warrant a preference, and that, where a

mere credit is employed, the money or fund does not pass so as to be traced within the meaning of the trust doctrine; and as to the user of the credit in reduction of the debt secured by collateral (which was directly and sufficiently alleged and proven in that case) the court says: "It was also *claimed* that the proceeds of the draft had thus been traced into this collateral. * * * *But if the contention is sound that they have been traced into the collaterals* the remedy of the petitioner is manifestly to proceed against them and not against the general assets of the estate." (Italics mine.) The court does not at all decide whether there would be a tracing of the fund under such circumstances. The Standard Oil case, 74 Fed., 395, is one in which the bank received a deposit when hopelessly insolvent, and known to be so to its officers. The depositor filed its claim as a general creditor, and then sued to set aside his election and tendered back his claim on the ground of mistake as to his rights and to obtain a priority for his deposit thus made.

It is earnestly insisted that the pleading does not clearly, distinctly, or at all, disclose any facts warranting any decree to plaintiff against the defendant's trust, and that the judgment of the court below must be affirmed.

Respectfully submitted,

WM. WALLACE, JR.,

Attorney for Appellee.

No. 392.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION, A Corporation,

Plaintiff in Error,

vs.

. K. DU BOIS, as Administrator of the Estate of Edward J. Curtis, Deceased,

Defendant in Error.

TRANSCRIPT OF RECORD.

Writ of Error to the Circuit Court of the United States, for the District of Idaho, Central Division.

INDEX.

United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCIATION, a Corporation,
Plaintiff in Error,
vs.
J. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, deceased.
Defendant in Error.

Order Extending Time to Docket Cause and File Transcript, etc.

For good cause shown it is hereby ordered, that the time to docket cause, and file the record in the above entitled cause in said court of appeals is hereby extended to and including the fifth day of August, 1897.

Dated July 16th, 1897.

JAS. H. BEATTY,
Judge.

[Endorsed]: Order Extending Time to Docket Cause and File Transcript, etc. Filed July 20th, 1897. Frank D. Monckton, Clerk. By Meredith Sawyer, Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCATION, a Corporation,
Plaintiff in Error,
vs.
J. K. DUBOIS, As Administrator of the Estate of EDWARD JAY CURTIS, deceased.
Defendant in Error.

Statement of the Errors on which Plaintiff Intends to Rely and Designating the Parts of the Record Necessary for the Consideration Thereof.

To the Defendant in Error, and Messrs. Alfred A. Fraser, and Geo. H. Stewart, his Attorneys.

You and each of you will please take notice, that the Plaintiff in Error, herewith presents and files with the Clerk of this Court, a statement of the errors on which it the said Plaintiff in Error intends to rely, namely:

I.

That the Circuit Court of the United States, for the Central Division of the State of Idaho, erred in deciding, that

the Laws of the State of New York of 1876, as Amended in 1877, and under which it held that the Notice given the deceased of the levying of the Assessment or Mortuary Call No. 68, was not given in time, applied to the Plaintiff in Error, above-named.

II.

That said Court erred in deciding, that the said Laws of the State of New York of 1876, as Amended in 1877, applied to insurance companies which like the Plaintiff in Error do business and operate upon the assessment plan.

III.

The said Court erred in deciding, that the Plaintiff in Error was required to give the deceased, or any of its members thirty days notice of the falling due of an Assessment or Mortuary Call.

IV.

The said Court erred, in not applying the Laws of the State of New York, chapter 175, Laws of 1883, to the Plaintiff in Error, and in not holding that the said Plaintiff in Error was subject only to the provisions of the said Laws.

V.

The said Court erred in not applying the decision of the New York Court of Appeals, in the case of Ronald v. Mu-

tual Reserve Fund Life Association, 132 N. Y. 378, to the Plaintiff in Error, and in not holding that the Plaintiff in Error was subject only to the provisions of the laws of the State of New York, chapter 175, Laws of 1883.

VI.

The said Court erred in deciding that the Notice of the Assessment or Mortuary Call, No. 68, dated and mailed by the Plaintiff in Error on June 1st, 1893, and calling for the payment by the said deceased of the said Assessment or Mortuary Call on or before July 1st, 1893, was not given or served as required by the said Laws of the State of New York of 1876, as Amended in 1877, if the said Laws did apply to the Plaintiff in Error.

VII.

The said Court erred, in not construing the Policy of Insurance in this case, according to the Laws of the State of New York applicable thereto.

VIII.

The said Court erred, in deciding that the said Notice of Assessment or Mortuary Call, No. 68, dated and mailed to the said deceased, by the Plaintiff in Error on June 1st, 1893, was not duly given or served.

IX.

The said Court erred, in deciding that the Assessment or Mortuary Call, No. 68, dated and mailed by the Plaintiff in Error on June 1st, 1893, was due July 1st, 1893.

X.

The said Court erred in deciding, that the failure by the said deceased to pay the Assessment or Mortuary Call No. 68, did not operate as a forfeiture of the policy of insurance in this case, and that notwithstanding such failure and default, that said policy of insurance remained in full force and effect.

XI.

The said Court erred, in ordering judgment for the defendant in error herein.

XII.

The said Court erred, in not ordering judgment for the Plaintiff in Error, Mutual Reserve Fund Life Association.

And you and each of you will take further notice, that the following papers, parts and portions of the transcript of the record and proceedings in this case are hereby distinctly designated, and which the said Plaintiff in Error

thinks necessary for the consideration thereof, and material to the case, to-wit:

First:—The Complaint in the case, as the same is stated and set forth on pages 1 to 13 of said record, both of said pages inclusive.

Second:—The Answer to the said Complaint, as the same is stated and set forth on pages 22 to 32 of said record, both of said pages inclusive, and with the exhibits thereto attached, and made part thereof.

Third:—The Stipulation, or Statement of Facts in said case, as the same is stated and set forth on pages 33 to 36 of said record, both pages inclusive.

Fourth:—The Affidavit of Bennett W. T. Amsden, as the same is stated and set forth on pages 37 to 51 of said record, both pages inclusive, and with the exhibits thereto attached, and made part thereof, saving and excepting the following exhibits appearing therein, which are hereby urged and requested to be eliminated therefrom, and should not be printed, namely:—"Mortuary Call No. 68, issued June 1, 1893, Part 2," the same being a portion of Exhibit A, of said affidavit on page 41 of said record, for the reason, and upon the ground, that the said paper is wholly immaterial to the case, and irrelevant to the issues involved therein.

Fifth:—The Judgment, as the same is stated and set forth on page 52 of said record.

Sixth:—The Opinion or Decision of the Court, as the same is stated and set forth on pages 53a to 53f of said record, both pages inclusive.

Seventh:—The Defendant's Bill of Exceptions, as the same is stated and set forth on pages 57 to 104 of said record, both pages inclusive, saving and excepting the following exhibits appearing therein, which are hereby urged and requested to be eliminated therefrom, and should not be printed, the same, and each of them already appearing in and made part of the said record, and being a repetition thereof, namely:—

a: The Stipulation, as the same is stated and set forth on pages 57 to 60, of said record, both pages inclusive, and in lieu thereof, insert the following words in the printed Transcript, namely:—"Here follows a copy of said agreed statement, and the same already appearing in this Transcript, and herein fully stated and set forth, is, for that reason not again herein inserted."

b: The Statement of Bennett W. T. Amsden, as the same is stated and set forth on pages 61 to 94, of said record both pages inclusive, together with all the Exhibits thereto attached, and therein mentioned and stated, and in lieu thereof, insert the following words in the printed Transcript, namely:—"Here follows a copy of said Statement of Bennett W. T. Amsden, together with the Exhibits thereto attached, and therein mentioned and stated, and the same already appearing in this Transcript,

and herein fully stated and set forth, is, for that reason not again herein inserted."

c: The Policy of Insurance, as the same is attached to, and marked Page 95 of said record, and in lieu thereof insert the following words in the printed Transcript, namely:—"Here follows a copy of the Policy of Insurance in this case, offered and admitted in evidence on the trial thereof, as one of Defendant's Exhibits therein, and a copy thereof being attached to, and made a part of the Complaint herein, and already appearing in this Transcript, is, for that reason not again herein inserted."

d: The Decision, as the same is stated and set forth on pages 97 to 102 of said record, both pages inclusive, and in lieu thereof, insert the following words in the printed Transcript, namely:—"Here follows a copy of the said Decision, and the same already appearing in this Transcript and herein fully set forth and stated, is for that reason not again herein inserted."

Eighth:—The Petition for Writ of Error, and Order of Court allowing the same, as the same is stated and set forth on pages 105 and 106 of said record.

Ninth:—The Assignment of Errors, as the same is stated and set forth on pages 107 to 109 of said record, both pages inclusive.

Tenth:—The Order of Court fixing the amount of security which the defendant should give and furnish upon

said Writ of Error, and suspending and staying all further proceedings etc., as the same is stated and set forth on pages 110 and 111 of said record.

Eleventh:—In lieu of the Supersedeas Bond stated and set forth on pages 112 to 118 of said record, both pages inclusive, insert the following words, in the printed Transcript, namely:—"A Supersedeas Bond in the sum of $6,570.70, as required and ordered to be given and furnished by the defendant upon said Writ of Error, was on the 21st day of June, 1897 duly and regularly given, furnished, and filed with the Clerk of the Court, pursuant to and in compliance with the said Order; that by written stipulation and agreement indorsed thereon, the Attorney for Plaintiff and Defendant in Error, accepted the said Bond, and waived all objections thereto, as to its form and sufficiency; that thereupon, the said Bond was duly approved by the Judge of the Court as to form and also as to sufficiency of surety."

Twelfth:—The Citation, and indorsements thereon, as the same are stated and set forth on page 119 of said record.

Thirteenth:—The Writ of Error, and indorsements thereon, as the same are stated and set forth on page 120 of said record.

Fourteenth:—Certificate of A. L. Richardson, Clerk, as the same is stated and set forth on page 121 of said record. No other or further part or portion of the said rec-

ord need be inserted or printed in the Transcript, but reference to the original record as filed can be made at any time.

Dated August 3rd, 1897.

Respectfully,

HAWLEY & PUCKETT.

Attorneys for Plaintiff in Error.

I. B. L. BRANDT,

Of Counsel for Plaintiff in Error.

[Endorsed]: Filed Aug. 3rd, 1897. F. D. Monckton, Clerk.

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

J. K. DUBOIS, As Administrator of the Estate of EDWARD JAY CURTIS, deceased.

Plaintiff,

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Defendant.

Complaint.

The plaintiff complains and alleges:

1st.

That the defendant is now, and at all times herein after named was a corporation duly organized and existing under and by virtue of the laws of the state of New York, and engaged in the business of writing life insurance and making contracts insuring the life of its patrons in the State of Idaho.

2nd.

That on the 17th day of July, 1889, the defendant, in consideration of certain bi-monthly payments, and the payment to them of an admission fee of $28.00 which said sum was paid to said defendant July 10th, 1889, and an annual payment of the sum of $18.00 by the said Edward Jay Curtis to it, made their policy of insurance in writing, a copy of which is hereto annexed and marked "Exhibit A" and made a part of this complaint, and thereby insured the life of the said Edward Jay Curtis in the sum of six thousand ($6000) dollars.

3rd

That on the 29th day of December, 1895, at Boise City, Ada County and State of Idaho, the said Edward Jay Curtis died.

That the said Edward Jay Curtis died, without leaving a last will or testament.

That thereafter, on the 15th day of January, 1896, a petition for letters of administration on the estate of the

said Edward Jay Curtis was filed for record in the Probate Court of the County of Ada, State of Idaho.

4th.

That thereafter such proceedings were had in said Probate Court.

That on the 27th day of January, 1896, by an order duly entered and made in said Court and upon said petition, J. K. Dubois was appointed as Administrator of the estate of the said Edward Jay Curtis, deceased.

That thereafter, the said J. K. Dubois duly qualified as such Administrator, by giving a bond as required by Law, and taking the oath of office, and entered upon the discharge of his duties as said Administrator, and ever since and still is such Administrator, and acting as such.

5th.

That the death of the said Edward Jay Curtis was not caused by his own hand, or by the effect of engaging in any duel, or any violation of any Law, or at the hands of justice.

6th.

That the said Edward Jay Curtis did not enter any naval service whatever, or any military service, company, or regiment, when in actual service, or otherwise during his lifetime, or since the issuing to him of said Policy of Insurance.

7th .

That the said Edward Jay Curtis, and the plaintiff, each, duly performed all the conditions of said Policy of Insurance on their part to be performed.

8th.

That on or about February 4th, 1896, this plaintiff informed said defendant, Mutual Reserve Fund Life Association, of the death of the said Edward Jay Curtis, and thereupon the said defendant denied all liability whatsoever on or under said contract of Insurance and declared that said Policy had lapsed for non-payment of assessment and was forfeited and was absolutely null and void and of no force and effect whatsoever, and refused to pay the same or any part thereof.

9th.

That the defendant has not paid the said six thousand ($6000) dollars as provided for in said policy of insurance nor any part thereof, and the said sum of six thousand ($6,000) is now due thereon from the defendant to the plaintiff as such administrator.

Wherefore, Plaintiff demands judgment against this defendant for the sum of six thousand ($6000) dollars,

and interest thereon at the rate of ten (10) per cent per annum from February 10th, 1896, and for such other and further relief as may be just and equitable.

GEO. H. STEWART,
ALFRED A. FRASER,
Attorneys for Plaintiff.

"Exhibit A."

No restriction as to travel or residence.

If this certificate or policy of insurance, shall have been in continuous force until five years from its date, it shall thereafter be incontestable for any cause, except non-payment of dues or mortuary premiums at the times and in the manner herein stipulated provided the age of the member is correctly stated in the application therefor .

"MUTUAL RESERVE FUND LIFE ASSOCIATION."

Number 86796 Annual Dues, $18.00

Home Office: Potter Building, 36 Park Row, New York, U. S. A.

In consideration of the application for this certificate of membership, or policy of insurance, which is hereby referred to and made a part of this contract, and of each of the statements made therein, which, whether written by his own hand or not, every person accepting or acquiring any interest in this contract hereby adopts as his own, admits to be material and warrants to be full and true,

and to be the only statements upon which this contract is made, and of the admission fee paid, the "The Mutual Reserve Fund Life Association," does hereby receive Edward Jay Curtis, of Boise City, County of Ada, Territory of Idaho, as a member of said association; and upon the consideration aforesaid, and upon the further consideration, and upon the condition of the payment of the dues for expenses to be paid on or before the seventeenth day of July in every year during the continuance of this certificate, or policy of insurance, and also upon the further condition of the payment of all mortuary premiums, payable at the Home Office of the Association in the City of New York, or to be an authorized Collector, within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of this Certificate, or Policy of Insurance, and subject to all the provisions, requirements and benefits stated on the second page of this Certificate, or Policy of Insurance, which are hereby referred to, and made a part of this Contract, there shall be payable to the legal representatives of said member, the sum of Six Thousand Dollars, within ninety days after acceptance of satisfactory evidence to the Association of the death of the said member.

Benefits under this certificate, or policy of insurance, shall not be impaired or restricted by travel or change of residence, and if this certificate, or policy of insurance, shall have been in continuous force until five years from its date, it shall thereafter be incontestable for any cause,

except nonpayment of dues or mortuary premium at the time and in the manner herein stipulated provided the age of the member is correctly stated in the application therefor. There shall be no restriction as to change of occupation, except that the member shall not enter any military or naval service whatsoever (the militia when not in actual service, excepted) without the consent of the Association, given in writing by the president or secretary thereof.

In Witness whereof the said "Mutual Reserve Fund Life Association" has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president, or vice-president, and secretary, or assistant secretary, at the City of New York, this 17th day of July, one thousand eight hundred and eighty-nine.

[Seal] (Signed) E. B. HARPER,
President.

J. M. Stevenson,
Asst. Secretary.

PROVISIONS, REQUIREMENTS AND BENEFITS.

I.

Within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this Certificate, or Policy of insurance, there shall be

payable to the association, a mortuary premium, for such an amount as the executive committee of the association may deem requisite, which amount shall be at such rates according to the age of each member, as may be established by the board of directors, and the net amount received, as provided in the constitution or by-laws of said association, less twenty-five per cent, to be set apart for the reserve or emergency fund, as hereinafter provided, shall go into the death fund to meet the current mortality of the association.

II.

II. Twenty-five per cent of the net receipts from mortuary premiums paid under this certificate, or policy of insurance, during a period of fifteen years from its date, shall be added to the reserve or emergency fund, which shall be held as provided in the constitution or by-laws of the association, deposited with a trust company or companies; deposited with departments constituted by government or legal authority; and upon the order of the board of directors of the association shall be securely invested in United States bonds, mortgages, or other interest bearing securities for the exclusive benefit of the members of the association, and the interest on the same as it accrues, shall be placed to the credit of the death fund, to be used in providing for the current death claims. The reserve or emergency fund above $100,000 may be applied to the payment of claims in excess of the actuaries' tables of mortality, and when any claim by

death is due after a mortuary premium call upon each member of the association has been made, according to the rules of the association, to make up any deficiency that may then exist in the death fund. No claim is payable by the association except from the death fund of the association at the time of said death, or from any moneys that shall be realized to the said fund from the next mortuary premium call made, or from the reserve or emergency fund as herein provided.

III.

The annual mortuary premiums on this certificate, or policy of insurance, after the same has been in force fifteen years from its date, shall not include any further contributions to the reserve or emergency fund, nor shall the net amount of such annual mortuary premiums thereafter exceed the annual premiuums required by the actuaries' tables of mortality, or the actual mortality experience of the association.

And after the expiration of said fifteen years there shall be credited to this certificate, or premium of insurance, if then in force, the equitable proportion of the then total surplus reserve or emergency fund accumulations, in which this certificate, or policy is then entitled to participate, including participation in the contribution to such surplus reserve or emergency fund under this certificate or policy, and also in the then equitable share of

such reserve or emergency fund accumulations contributed thereto by members (otherwise participating) whose policies have terminated by death, expiry or lapse, which said proportion or sum shall be then ascertained and determined by the actuary of the said association and the amount so ascertained and determined shall be available to the member insured under this certificate, or policy, in the manner following, that is to say:

First—At the option of said member, provided he shall notify said association in writing at least one (1) year before the expiration of said fifteen years, that he desires to have said sum paid as a tontine accumulation, then, and in that event, this certificate or policy, shall thereupon, on the completion of said term of fifteen years, be payable only as a cash tontine accumulation, so ascertained and determined as aforesaid, and shall be paid in cash to said member upon the surrender hereof to said association.

Second—If said member shall not exercise said option and such surplus accumulations shall not be applied as aforesaid, then the same, after the expiration of said period of fifteen years, shall be available as cash towards payment of future dues and mortuary premiums under this certificate or policy.

IV.

This contract is not binding until the written application thereof shall have been received, accepted, and this certificate or policy of insurance, issued by the associa-

tion, and delivered to said member, in person during his life, while in good health, nor until the admission fee is paid thereon. No agent of the association has authority to make, alter or discharge contracts, waive forfeitures, extend credit, or grant permits, and no alteration of the terms of this contract shall be valid, and no forfeiture thereunder shall be waived, unless such alteration or waiver shall be in writing and signed by the president or vice-president and one other officer of the association.

V.

A notice of a mortuary premium, or other notice addressed to a member, or other person at the postoffice address appearing on the books of the association, shall be deemed a sufficient notice, and affidavit of, or proof of addressing and mailing the same according to the usual course of business of said association, shall be taken and admitted as evidence, and shall be, constitute, and be deemed and held to be conclusive proof of due notice to said member and every person accepting or acquiring any interest thereunder. And in the event of the non-receipt by a member of a mortuary premium notice on or before the first week day of February, April, June, August, October and December of each and every year, it shall be nevertheless a conditioned precedent to the continuance of this certificate, or policy of insurance, in force, that an amount equal at least to the amount of the next preceding mortuary premium paid, shall be paid said asso-

ciation within thirty days from the first week day of February, April, June, August, October and December, of each and every year. Notice that a mortuary premium is payable to said Association on the first week day of February, April, June, August, October, and December of each and every year is hereby given and accepted, and any further or other notice is expressly waived.

VI.

Payment of dues and mortuary premiums as herein provided, shall be made by the member so long as such member may desire to keep this certificate or policy in force; provided, however, that if this certificate or policy has been in force for five years from its date, that then and in that event, and thereafter and before the expiration of ten years from its date, death shall occur within six months from the date of maturity of dues unpaid, or with six months from the date of the mortuary call which such member has omitted or neglected to pay, this certificate or policy shall, nevertheless be paid and payable to the beneficiary hereunder in the same manner as if payment of such dues or mortuary premiums had been made when due. And if this certificate or policy shall have been in force for ten years from its date, that then and in that event, and thereafter and before the expiration of fifteen years from its date, death shall occur within one year from the date of maturity of dues unpaid, or within one year from the date of the mortuary call which such member has omitted or neglected

to pay this certificate or policy shall nevertheless be paid and payable to the beneficiary hereunder in the same manner as if payment of such dues or mortuary premiums had been paid when due.

VII.

No assignment or transfer of this certificate or policy of insurance, shall be valid until a duplicate or a certified copy thereof shall be delivered to the association at its home office, and the same approved by its secretary or assistant secretary, and any assignment or transfer without delivery of the same or a certified copy thereof to the association and approval thereof by its secretary or its assistant secretary, shall render this certificate or policy of insurance, null and void. Under no circumstances shall the association be in any way responsible for the validity of any assignment or transfer. An insurable interest, existing at the time of the assignment or transfer must be shown by all claimants, at the time of claim thereunder; and claims by any creditor as beneficiary or assignee, shall not exceed the amount of the actual bona fide indebtedness of the member to him existing at the time of said death, together with any payments made to the association under this certificate, or policy of insurance, by such creditor, with interest at six per cent, per annum, and this certificate, or policy of insurance, as to all amounts in excess thereof shall be void.

VIII.

The proof of the death by which this contract matures shall include full and true answers, under oath, to all questions asked by the association, relating to the life, health and death of the member. When proof of death shall be made by presumption arising from disappearance or circumstantial evidence, no claim shall accrue or be payable until the presumption of death shall by the rules of law be complete, and only on the further condition that all dues and mortuary premiums under this certificate, or policy of insurance, shall continue to be paid to the association until the completion of said period in the same manner and at the same times as though said member were living.

IX.

Death of the member by his own hand, whether voluntary or involuntary, sane or insane at the time, is not a risk assumed by the association in this contract, but in every such case there shall be payable, subject to all the conditions of this contract, only a sum equal to the amount of the mortuary premiums paid by said member, with six per cent. interest per annum; but the board of directors or the executive committee of the association, at their option, may in such case order such further payment as may to them seem just and equitable, not ex-

ceeding in the aggregate the maximum amount of this contract.

X.

This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York; and said association shall not be held liable, and no action at law or suit in equity shall be brought or maintained hereon or recovery had, unless such action or suit is commenced within one year from the date of the death of said member; and if any action or suit is brought after that time the lapse of time shall be a conclusive bar thereto.

XI.

No personal liability of the member is incurred by becoming a member of this association, and the continuance of this certificate, or policy of insurance, and payments by the member are voluntary, at the option of the member, to continue only so long as the member may desire to keep this certificate, or policy of insurance, in force, but a failure to make the payments as herein stipulated will terminate this contract. This contract, on the part of the association, is a bi-monthly term contract, renewable at the option of the member, before expiration upon payment of the dues and mortuary premiums at the times and in the manner in this contract provided.

XII.

This certificate, or policy of insurance, is also issued and accepted subject to the express condition that if any of the payments stipulated in this contract shall not be paid on or before the day of the date as provided in this contract, at the home office of the association in the city of New York, or to a duly authorized collector of the association upon a receipt signed by its president, secretary or treasurer; or if said member shall enter any military or naval service whatsoever (the militia when not in actual service excepted), without the consent of this association given in writing by the president or secretary thereof; or if death shall be caused by or from the effects of engaging in any duel or in violation of any law, or at the hands of justice; or if any statement made in the application for this certificate, or policy of insurance, is in any respect untrue, or if any of the agreements in said application are violated by said member; then, and in each and every such case, the consideration of this contract shall be deemed to have failed and this certificate, or policy of insurance, shall be null and void and all payments made thereon shall be forfeited to the association.

[Endorsed on the back as follows]: No. 86796. The dues and mortuary payments on this Policy are payable to the Association direct. Agents are only authorized to collect the same on presentation of receipts signed by its president, secretary, or treasurer. "Mutual Reserve

Fund Life Association." Potter Building, Park Row, New York, U. S. A. Cash surplus over $1,885,000.00 Policy of Insurance. Edward Jay Curtis. Date July 17th, 1889. Amount, $6000. Admission fee, $24. Annual dues, $18. Members must send to the New York office of the association prompt notice of any change in postoffice address. Always give number of policy in writing to the office.

State of Idaho,
County of Ada. } ss.

J. K. Dubois, being duly sworn, says as follows:

1st. That I am duly appointed, qualified and acting administrator of the estate of the said Edward Jay Curtis, deceased, and am the plaintiff named in the foregoing action.

2nd. I have read the foregoing complaint and know the contents thereof, and the same is true of my own knowledge, except as to those matters therein stated to be upon information and belief, and as to those matters I believe it to be true.

(Signed) J. K. DUBOIS,
Plaintiff.

Subscribed and sworn to before me this 23rd day of April, 1896.

[Seal] JONAS W. BROWN,
Notary Public.

[Endorsed]: Complaint. Filed July 25th, 1896, at 9:30 A. M. Chas. S. Kingsley, Clerk. By Geo. W. Lamoreau, Deputy

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the District of Idaho.

J. K. DUBOIS, As Administrator of the Estate of EDWARD JAY CURTIS, Deceased,

Plaintiff,

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Defendant.

Answer.

Comes now the defendant, and for answer to plaintiff's complaint on file herein, admits, denies and alleges.

I.

Defendant admits and alleges that at all the times mentioned in said complaint it was, and still is, a corporation formed, organized and existing under and by virtue of chapter 267 of the Laws of 1875, and of chapter 175 of the Laws of 1883 of the State of New York, receiving and accepting members upon the terms and provi-

sions of written applications for membership, and under and subject to all the provisions of its constitution or by-laws, whereby, as in such applications and the certificates of membership or policies of insurance issued thereon, certain benefits accrue as therein provided, and not otherwise.

II.

Defendant alleges that on or about the 9th day of July, 1889, a certain application in writing, dated on that day, and signed by one Edward Jay Curtis in the complaint herein mentioned, was made to the defendant association, wherein and whereby a certificate of membership or policy of insurance was applied for to be issued payable to the legal representatives of said Edward Jay Curtis, which said certificate of membership or policy of insurance is the certificate or policy designated in the complaint herein, or intended so to be, and which said application is the application referred to in said certificate or policy, to which said application this defendant refers, and hereby makes the same a part of this answer.

That this defendant relying upon, and in consideration, among other things, of the aforesaid application, and the statements therein contained, did, after the presentation to it of the said application, and on or about the 17th day of July, 1889, issue to the said Edward Jay Curtis the certificate of membership or policy of insurance mentioned and described in the complaint herein, or intended so to be, and not otherwise.

This defendant denies that the said certificate or policy of insurance is fully and correctly described in the complaint herein, and denies that the copy thereof which purports to be annexed to the said complaint, marked Exhibit A, is in all respects a true and correct copy of said certificate or policy and defendant begs leave to refer to said original certificate or policy when the same shall be produced and proved by the said plaintiff upon the trial of this action.

III.

Defendant has no knowledge, information or belief sufficient to enable it to answer the allegations set forth and contained in paragraph III of plaintiff's said complaint, and therefore denies the same.

IV.

Defendant has no knowledge, information or belief sufficient to enable it to answer the allegations set forth and contained in paragraph IV of plaintiff's said complaint, and therefore denies the same.

V.

Defendant has no knowledge, information or belief sufficient to enable it to answer the allegations set forth and contained in paragraph V of plaintiff's said complaint, and therefore denies the same.

VI.

Defendant has no knowledge, information or belief sufficient to enable it to answer the allegations set forth and contained in paragraph VI. of plaintiff's said complaint, and therefore denies the same, and the whole thereof.

VII.

Defendant denies that the said Edward Jay Curtis, deceased, or the plaintiff, or either of them, duly performed all or any of the conditions of said policy of insurance on their or either of their parts to be performed, as will hereafter more fully appear.

VIII.

Defendant admits that on or about February 4th, 1896, plaintiff informed defendant of the alleged death of the said Edward Jay Curtis and that it thereupon declared that the said certificate or policy had lapsed for non-payment of a mortuary call or assessment sometime prior thereto. Defendant denies that it denied all liability whatsoever on or under the said contract of insurance, and denies that it refused to pay the same, or any part thereof.

IX.

Defendant admits that it has not paid the said sum of

six thousand dollars as provided for in said policy of insurance, or any part thereof, and denies that said sum of six thousand dollars, or any other sum or amount, is now due thereon, or due at all from the defendant to the said plaintiff as such administrator, or otherwise.

For a further and separate answer herein, the defendant alleges:

I.

Defendant repeats the allegations contained in the paragraph marked I of its first defense hereinbefore set forth, and makes them a part of this defense as though set forth fully and at large herein.

II.

Defendant alleges that on or about the 9th day of July, 1889, the said Edward Jay Curtis made application to it, wherein and whereby a certificate of membership or policy of insurance was applied for to be issued, payable to the legal representatives of the said Edward Jay Curtis, which said certificate of membership or policy of insurance is the certificate or policy designated in the complaint herein, or intended so to be, and which said application is the application referred to in said certificate or policy, and a true and correct copy of which said application is hereto attached and made a part hereof, and marked Defendant's Exhibit A.

Defendant alleges that in and by said application it was agreed by the said Edward Jay Curtis that the answers and statements therein, Parts 1 and 2, whether written by the applicant or not, were warranted to be full, complete and true, and that said agreement, and the constitution or by-laws of the association, with the amendments thereto, together with the said application, were hereby made part of any policy that might be issued thereon.

III.

That this defendant relying upon, and in consideration of, among other things, the aforesaid application, and the statements therein contained, did, after the presentation to it of the said application, and on or about the 17th day of July, 1889, issue to the said Edward Jay Curtis the certificate of membership or policy of insurance mentioned or described in the complaint herein, or intended so to be, and not otherwise.

Defendant denies that the said certificate or policy of insurance is fully and correctly described in the complaint herein, or that the alleged copy thereof which is attached to said complaint marked Plaintiff's Exhibit A. is in all respects a true and correct copy of said certificate or policy, and begs leave to refer to said original certificate or policy of insurance when the same shall be produced and proved by the said plaintiff upon the trial of this action.

IV.

That thereafter and on the day of July, 1889, said Edward Jay Curtis received and accepted said certificate of membership or policy of insurance; accepted, agreed and assented to all the terms, conditions and agreements, and rules and regulations of said defendant association as contained and set forth in the said application for and said certificate or policy of insurance, and in the constitution or by-laws of said defendant association.

V.

That the said certificate of membership or policy of insurance, and the membership of the said Edward Jay Curtis, and all the rights of said Edward Jay Curtis, and of the plaintiff herein, became, and were, and are subject to the terms and provious of the constitution or by-laws of the defendant association, all of which are hereby referred to and made a part of this answer, and a true and correct copy of which is hereto attached and made a part hereof, and marked Defendant's Exhibit B.

VI.

That one of the conditions, provisions and agreements contained in said application for and said certificate of membership or policy of insurance, and said constitution

or bylaws, and which was accepted, agreed and assented to by the said Edward Jay Curtis, was the payment of all mortuary premiums at the home office of the said defendant association in the city of New York, or to an authorized local collector within thirty days from the first week day of the months of February, April, June, August, October, and December of each and every year during the continuance of said certificate of membership or policy of insurance, and in the case of the failure by said Curtis to pay said mortuary premiums at said times, and in manner and form therein and heretofore set forth then, and in such case, the consideration of said contract should be deemed to have failed, and the certificate of membership or policy of insurance issued to said Curtis as aforesaid, and sued upon herein, should be null and void, and all payments made thereon should be forfeited to the defendant association.

VII.

That on the 1st day of July, 1893, an assessment or mortuary call, or premium known as mortuary call No. 68, in the sum of $33.96 (the same being one of the bi-monthly payments referred to in paragraph II. of plaintiff's said complaint) became due and payable at the home office of said association or to some duly authorized agent of said defendant association in accordance with the terms and conditions of said contract of insurance as aforesaid, but to pay the same said Edward Jay Curtis failed and refused, and did so fail and refuse to pay

the same up to time of his death, and the same has never been paid by the said Edward Jay Curtis, or by any one for or on behalf of the said Edward Jay Curtis to this association, or to any duly authorized agent or collector of this said defendant.

VIII.

That the said Edward Jay Curtis had due notice, in accordance with the terms and conditions of the said contract of insurance that said mortuary call No. 68 aforesaid was due and payable in manner and form as in said contract of insurance set forth and contained, and that said Edward Jay Curtis was never reinstated in said defendant association.

IX.

That by reason of the failure of said Edward Jay Curtis to pay said sum of $33.96 due upon said mortuary call No. 68 aforesaid, on or before the first day of July, 1893, the date that the same became due and payable, said contract and policy of insurance issued to him as aforesaid and sued upon herein, became, and was, and is, and has remained, null and void, and of no force or effect, and all payments made thereon were forfeited to the defendant association.

Wherefore defendant having fully answered the complaint of the plaintiff herein, prays to be hence dismissed with its costs in this behalf expended.

HAWLEY & PUCKETT,
Attorneys for Defendant.

State of New York,
City and County of New York. } ss.

Charles W. Camp. being first duly sworn according to law, deposes and says: that he is the secretary of the Mutual Reserve Fund Life Association, a corporation, the defendant herein, and as such officer makes this verification; that he has read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on information or belief, and as to those matters he believes it to be true.

CHARLES W. CAMP.

Subscribed and sworn to before me this 2nd day of December, 1896.

SEWELL T. TYNG,
Notary Public, N. Y. Co. No. 66.

State of New York,
City and County of New York, } ss.

I, Henery D. Purroy, clerk of city and county of New York, and also clerk of the Supreme Court for the said city and county, the same being a court of record, do hereby certify, that Sewell T. Tyng, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court in said State, and for general purposes; that I am well acquaint-

ed with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said court and county, the 2 day of Dec. 1896.

[Seal] HENERY D. PURROY,

Clerk.

(FORM 1. K.) Edition Sept., 1869.

Name of Member

Approved by

M. D.

Executive Committee.

This Application is to be filled up by the Office only.

Received by — *Age,* — *years.* *Date first payment,* July 17

Date, — *Admission Fee,* $ — *Date regular "*

Declined — *M.D.* *Dues,* - - - $ — *Date of Issue,*

Policy written by — *How payable,* — *Amount,* $

" *examined by* — *Assessments,* - $

APPLICATION FOR A MEMBERSHIP OR POLICY OF INSURANCE IN THE

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Part 1. Potter Building, 38 Park Row, New York.

Conditions upon which this application is made are that no personal liability of the applicant shall be incurred by becoming a member of this Association. Payments by the member are voluntary at the option of the member to continue only so long as the member may desire to keep the said certificate or policy in force.

1. *Name, at full length, of the Applicant for Policy of Insurance,* (Write in Ink.) Edward Jay Curtis

Occupation, past and present, {If a Clerk, Salesman, or Merchant, state articles dealt in. / If a Mechanic or Laborer, state what kind.} lawyer Secretary Territory of Idaho

Residence, Boise City

P. O. Address, Boise City Idaho.

County, Ada *State,* Idaho

Shall Notices be addressed to the applicant at P. O. {yes / *Address as stated above?* / no}

The "P. O. Address," if not specially given, will be assumed to be the same as "Residence."

AGE OF BENEFICIARY.

2. Name in full and Age of the Person for whose benefit the Certificate or Policy is issued, (Write in Ink.) Favor myself subject to evil — *Relationship to the Applicant,*

Residence, Boise City Ida — Medical 1833

3. Sum applied for, $ 5000 6000 Increase 4. The dues are limited to $3.00 annually on each $1,000, payable in advance. Examination extra.

5. Place and Date of Birth of the Applicant	PLACE.	COUNTY.	STATE.	DAY.	MONTH.	YEAR.
	Near Salem	Marion	Ore	13	Dec	1850

6. Applicant's Age at nearest Birthday? 39 Weight, 195 lbs. Has your weight recently increased or decreased or does it remain about the same? remain Height 5 ft. 10 in. Whether married? yes

7. Do you agree that you will not use alcoholic or malt liquors to excess, or habitually use opium, hydrate of chloral, or other narcotics (tobacco excepted)? yes

8. a. Is the applicant now insured in this Association, or has he ever been? If so, state Numbers of Certificates or Policies and Amount.

b. If any certificates or policies on your life in this Association have heretofore been issued then those stated, and now in force, do you agree that any certificate or policy issued on this application shall be void?

	No.	AMOUNT $
A.	216	
B.	no	

9. Has the applicant now any insurance on his life? If so, where, when taken, for what amounts, and what kinds of policies?

COMPANY OR ASSOCIATION.	WHEN TAKEN.	AMOUNT.
none		

10. Has any proposal to insure the life of the applicant ever been postponed or declined? If so, by what Company or Association, and for what reason? Yes Sir

11. a. Has any proposal or application to insure the life of the applicant or for membership ever been made to any Company, Association, or Agent upon which a policy or certificate of membership has not been received by you in person for the full amount and kind, and at rate applied for?

b. Have you any insurance on your life or membership in any Company or Association not mentioned in answer to above question 9?

A.	no
B	no

12. Has any physician given an unfavorable opinion upon the life of the applicant with reference to Life Insurance or otherwise? If so, state particulars.

13. Has any consultation, and for what diseases have you had or required his attendance and advice, or that of any other physician or adviser?

A.	no
B	no

14. Have you consulted any physician or physicians regarding your health within the past five years other than stated above? If so, what physicians, when, and for what?

Have not

15. Have you had any ailment, disease, injury, or illness within the past five years?

none

16. Have you used externally or internally any patent, proprietary, or other medicines, within the past twelve months? If so, what, and for what diseases?

no Kenis but occasionally

17. Have any facts regarding your past health or present condition been omitted?

No

18. State the family history of the applicant whose life is proposed to be insured in answer to the following particulars:

N B In giving "Cause of Death," avoid all indefinite terms, such as "Fever," "General Debility," "Exposure," etc. If the word "Childbirth" be used, specify how long after delivery the death occurred, and whether it was accompanied by any disease of the Uterus.

	(Age, if living.)	Condition of Health.	Age at Death.	Cause of Death.
Father,				
Mother,				accident fell from a buggy
			8	concussion

21.	How many has the person had?	How many living?	Their ages and state of health?	How many are dead?	At what ages did they die?	Of what Disease did they die?
Brothers,	2	None		2	25 yrs	26 Inflammation of Lungs
					45 yrs	Heart Disease
Sisters,	2	2 in first rate health		2	2 yrs	Fever
					Than myself	never learned

22. Age and Cause of Death of Father's Father, don't know but both old Age and Cause of Death of Mother's Father, don't know but quite old

" " " Mother, do do " " " Mother, do do

23. Name one institution and reside near if two personal friends (not relatives), whom you have known for past THREE years.

NAME.	OCCUPATION.	RESIDENCE.
Lloral S Sharp	Governor	
John Lenk	Capitalist	

References must be given.

IT IS HEREBY WARRANTED by the applicant, that the answers and statements in this application, Parts 1 and 2 whether written by his own hand or not, are full, complete, and true, and it is agreed that this warranty shall form the basis and shall be a part of the contract between the undersigned and the MUTUAL RESERVE FUND LIFE ASSOCIATION, and are offered to said Association as inducements for the Association to issue the Certificate of Membership or Policy applied for, and the Application and the applicant further hereby agree that if he or agent is made herein, together with the Application, and hereby made part of any Certificate or Policy that may be issued on the consideration of such Certificate or Policy, or by the Committee or By Laws of said Association, are not true, full, and complete, or if he or his representatives shall omit or neglect to make any payment as required by said Certificate or Policy and the same shall be restored to them and all benefits thereunder forfeited to said Association. It is hereby expressly agreed that the person soliciting or taking this application may cannot add to, alter, or change the written answers, statements, or information herein contained, and that no statement not contained in this Application and handed in only to the officers at the Home Office of the Association, in the manner after the receipt of such answers, statements, or information be received in writing and completed in this Application, or any other person, or to the Association, shall be binding on the Association, or in any way affect the rights of the Association, or be considered as a waiver of any of its provisions, or to change, alter, or modify any of the terms of the Certificate or Policy issued hereon, unless otherwise or rendering him incompetent to pass upon the risk, or any physician from disclosing any information acquired in attending the applicant in a professional capacity or hereby authorizing the health and physical condition of the applicant. And the applicant further agrees that under no circumstances shall the Certificate or policy authorizes and requests any such physician to and acceptance of the first annual dues by the Association, or the delivery of the Certificate or Policy to the applicant, with a request for the payment of the first annual dues signed by the President, Secretary, or Treasurer of the Association, during the lifetime and good health of the applicant. And the applicant further agrees that the Association shall not be liable until such payment is made, nor then unless the same shall be made known are matters, full, and complete, or in the event of any misrepresentation by the applicant or any agreement herein, or if he or his representatives shall omit or neglect to make any of the statements or answers and shall be payable made thereon forfeited to the Association, and I hereby agree to pay dues annually in advance at the rate of $3.00 per thousand, and all monetary assessments as long as such Certificate or Policy shall remain in force.

This risk is recommended by me as a good risk, I am a witness to the signatures, which I certify to be genuine, and the answers herein, and all of them are true to the best of my knowledge and information.

Dated at ——— 18

——— *Solicitor*

Solicitor's P. O. Address,

Signature of Applicant for membership in the Association. Edward Jay Curtis

Name of the Beneficiary.

THE APPLICANT MAY SIGN FOR THE BENEFICIARY

This Application forwarded to the Association by ——— *General Agent. (P. O. Address)*

Before forwarding this Application to the Home Office see that all questions have been properly answered. READING AND MISSING ANSWERS CAUSE DELAY.

Examinations must be written in ink.

APPLICATION—PART 2.—ANSWERS OF APPLICANT TO QUESTIONS BY THE MEDICAL EXAMINER.

Examinations must be written in ink.

NOTE.—The Examiner is Required, by His Own Handwriting, to Record the Answers of Applicant to Every Printed Question, *distinctly and decidedly, and to make a strict personal examination of the applicant at the time.* When an examiner is first employed, his credentials upon the blank furnished for that purpose, must accompany the application.

1. A. Name in full of the applicant examined, Edward Jay Curtis
   B. Residence, Boise City Idaho.
   C. Occupation, Secretary of Idaho
   D. Age nearest Birthday, 50
   (Write in ink.) yes

2. Is the applicant now, and has the applicant been in good health through all the past twelve months, and free from all disease, weaknesses, and infirmities? yes

3. Has applicant been successfully vaccinated? (Vaccination is required in all cases.) yes

4. Are the habits of the Applicant at the present time, and have they always been, sober and temperate? yes

5. Is the applicant now, or has he ever been, engaged IN ANY WAY in the manufacture or sale of spirituous or malt liquors, or wines? If so, how and when? no

6. Does the applicant use ardent spirits, wine, or malt liquor? If so, to what extent—average quantity each day? no

7. Does the applicant use opium, morphine, hydrate of chloral, or other narcotic, or has applicant ever used them (tobacco excepted)? no

8. Has the applicant ever had severe headaches, vertigo, fits, or any nervous or muscular trouble; or has he ever had any other disease, personal injury, or infirmity? no

9. Has change of climate or location ever been sought, or advised, or have you visited any place for the benefit of, or on account of, your health within the past five years? If so, when, where, and for what? Answer fully. no

10. Is the applicant ruptured? If so, of what kind, single or double; is it reducible, and is a suitable truss worn? (If ruptured a suitable truss must be worn.) no

11. A. Has the applicant ever been or is he now subject, or predisposed to cough, expectoration, spitting of blood, or shortness of breath, or pain in the lungs, or to bronchitis, or to hemorrhage, or to pleurisy, or to pneumonia, or to any affection of the throat or lungs? no
    B. Has the applicant ever had Pneumonia, spitting or rising of blood, or other hemorrhages? no

12. A. Has the applicant ever had Inflammatory Rheumatism? B. If so, how many attacks, and in what years? C. Duration and severity? D. Were they accompanied by Cough, Shortness of Breath, Pain in the Chest, or Palpitation of the heart?

A.	no	C.
B.	—	D.

13. Has the applicant or either of the applicant's parents, brothers, or sisters, now, or ever had or been afflicted with consumption, cancer, gout, scrofula, diabetes, rheumatism, epilepsy, insanity, or any pulmonary complaint, or any hereditary disease? If so, give full particulars of each case. not that he knows of. Some uncle died of consumption about 1840

14. A. Has the applicant any tendency, hereditary or acquired, to any local or constitutional disease?
    A no
    B. Has the applicant ever had any disease of the stomach, abdominal, urinary or other organs? B no

15. Is the applicant now subject to or has he ever had:

	Answer Yes or No.		Answer Yes or No.	And if Yes, the question must be stricken out by running the pen through the particular disease or ailment.	Answer Yes or No.
Aneurism		or Disease of Brain		or General Debility	
or Asthma		or Diabetes		or Gout	
or Apoplexy		or Disease of the Heart		or Palpitation of the Heart	
or Bright's Disease		or Disease of the Stomach or Bowels		or Pleurisy	
or Bronchitis		or Disease of the Liver		or Pneumonia	
or Cancer		or Disease of the Kidneys		or Rheumatism	
or Colic Bilious or Renal		or Dropsy		or Swelling of the Feet, Hands or Eyelids	
or Consumption, or any form of trouble re-	no	or Dyspepsia	no	or Spitting or Coughing of Blood	no
lating to the Lungs		or Indigestion		or Spinal Disease	
or Cough (habitual)		or Dysentery		or Shortness of Breath	
or Chronic Diarrhœa		or Epilepsy		or Small Pox	
or Deafness		or Excessive or Scanty Secretion of the Urine		or Stricture of Urethra	
or Delirium Tremens		or any Disease of the Genital or Urinary		or Sunstroke	
or Dizziness or Vertigo		Organs		or Suppurating Glands	
or Difficulty in swallowing, or any symptom		or Fungous or Disease of the Skin		or Syphilis	
indicating Disease of the Heart or nigh		or Erysipelas		or Typhoid Fever	
boring vessels		or Fistula		or Yellow Fever	
or Difficulty in Urinating		or Fits or Convulsions			

16. Has the applicant ever had any illness, injury, or ailments enumerated or not enumerated in the foregoing? If so, what Hospital? When? During? For what cause? State expressly each and every case. no

17. Has the applicant been an inmate of any Hospital? If so, what Hospital? When? During? For what cause? State expressly each and every case. no

18. If the applicant be a woman, state: (a) Number of children had. (b) If now pregnant. (c) Whether any miscarriage or difficulty in labor. (d) Are the menstrual functions regular? (e) Has she ever suffered from uterine or menstrual disorder? (f) Date of birth of last child. *If yes state the particulars.*

A.	D.
B.	E.
C.	F.

I do hereby warrant, that the foregoing answers, written, to the above questions, are my answers, and are full, complete, correct, and true, and the same shall be made a part of the contract of my Certificate of Membership, or Policy of Insurance, in the Mutual Reserve Fund Life Association, and that I am the person who signed the application on the 1st day of Dec. 1894, at Boise City Idaho, and have answered below, and should this application for membership be accepted, I do thereupon constitute and appoint Edward Jay Curtis as my Beneficiary, to receive the benefits provided for in my Certificate of Membership, in case of my death at any time prior to the delivery to me of said Certificate, and before the payment of my first assessment, and I do hereby agree that the receipt of said Beneficiary, or the payment of the funeral expenses of the deceased, by any person, shall be a full discharge of all liability under said Certificate.

SIGNATURE OF MEDICAL EXAMINER AS WITNESS { Rose E. Caubrey M.D. APPLICANT. { Edward Jay Curtis

PART 3. ANSWERS BY MEDICAL EXAMINER.

1. A. Do you personally know the applicant? yes B If so, how long? 2 years C. Does the applicant appear older than stated? no

2. Fill up as fully and exactly as possible, the following form of DESCRIPTION of the applicant, who must be IDENTIFIED by the examining physician as the same person who SIGNED the application on the reverse side of this Application, with the view of preventing the substitution of a HEALTHY IN PLACE OF A SICK PERSON.

RACE	SHAPE OF CHEST UNDER THE VEST		FIGURE		CONDITION OF SKIN (DRY OR MOIST)	PHYSICAL DEFECTS OR DEFORMITIES.
	Forced Expiration	Forced Inspiration	GENERAL APPEARANCE	EYES	Blue	
				HAIR	Gray	Has the weight of the applicant recently decreased or increased, or does it remain about the same?
WEIGHT	HEIGHT	GIRTH OF WAIST		COMPLEXION	Clear	
154	5 ft 9 in	36 in	Healthy		Fair	remains about the same

3. Does the applicant now look, and has he always led a sober and temperate life? yes

4. A	Is the respiratory murmur clear and distinct over every part of both lungs?	A yes
B	Is the respiration full, easy, and regular?	B yes
C	Are the organs of respiration free from any indication of disease?	C no
D	Number of respirations per minute	D 18
5. A	Is the action of the heart uniform, free, and steady?	A yes
B	Are its sounds and rhythm regular and normal?	B yes
C	Are the heart and blood vessels free from any indication of disease?	C no

6. A. State the rate and character of the pulse? A Sitting 74 Standing B. Is it regular? yes c. Is it free from intermission? no

7. Result of Examination of Urine. A Sp. Gr. B Reaction Acid C. Albumen no D. Sugar no

8. Which parent does applicant most resemble physically, his father or mother? Father

9. Have you reviewed, with the applicant, all the answers to the queries in Part 1 of this application, and if so, did he acknowledge that they were all fully understood and truthfully answered by him? yes

10. A. Do you find the applicant in perfect health and safely insurable, and do you advise that the policy be issued? Answer Yes or No. What Amount? A yes $5000
    B. If safely insurable, do you consider the applicant a FIRST CLASS RISK, A GOOD RISK, or only a FAIR RISK? State Which. B Good Risk
    C. What feature, if any, in the case makes you rate the risk at other than First class? C

I Certify that I have this day made a personal examination, in private, of the above named applicant, that the foregoing answers in part two of this application are in my own handwriting, and that I am a WITNESS TO THE SIGNATURE OF APPLICANT and that my FEE, $3.00, for said examination is paid.

SIGNATURE OF EXAMINER Rose E. Caubrey M D

Examined at Boise City Idaho | Where and When Graduated at Ann Arbor Medical College 1875
this 1st day of Dec 1894 | Present Post Office Address Boise City Idaho

ADDITIONAL REMARKS.

Confidential communications solicited from the Medical Examiner.

J. W. BOWDEN, M. D.
Medical Director,
Potter Building, 38 Park Row, New York.

NOTICE TO AGENTS OF THE MONOPOLY COMPANIES AND OTHERS.—*The Mutual Reserve Fund Life Association will pay Five Hundred Dollars Reward to any person furnishing evidence securing the conviction of any one perpetrating a fraud upon the Association, by securing membership upon a diseased, dying, or dead man, lunatic or otherwise.*

THIS MARGIN IS FOR BINDING. DO NOT WRITE IN IT.

NOTICE TO MEDICAL EXAMINERS.—The Association will pay to the Examining Physician his receipt at the office at the Home Office. The Agent is not authorized to collect the fee for the physician from the applicant.

To be attached to and form part of my application for a a policy of $6000 issued by the Mutual Reserve Fund Life Association and numbered 86,796.

I, Edward J. Curtis of Boise City, County of Ada, Territory of Idaho, do hereby make oath that to the best of my knowledge and belief, I was born on the 13th day of December, and my age at nearest birthday is 57.

EDWARD JAY CURTIS.

Sworn to before me this 31st day of July, 1889.

S. H. HAYS,
Clerk Supreme Court, Idaho Ter.

Edward J. Curtis,
Secretary,
86796.

Department of the Interior.
Secretary's Office, Idaho.
Boise City, July 18, 1889.

To the Mutual Reserve Fund Life Association of New York City:

I hereby authorize you to change the amount applied for from five thousand to read six thousand.

EDWARD JAY CURTIS.

Signed in my presence.

S. L. WINNER,
Genl. Mgr. for Oregon and Idaho.

I approve as safe the addition of one thousand dollars on the application of Edward Jay Curtis; that is to read six thousand instead of five thousand as applied for.

JESSE K. DUBOIS, M. D.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the State of Idaho.

J. K. DUBOIS, As Administrator of the Estate of EDWARD JAY CURTIS, deceased.

Plaintiff,

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION, OF NEW YORK,

Defendant.

Stipulation of Facts.

It is hereby stipulated and agreed, by and between the parties to the above entitled action, that the following statement of facts shall constitute the evidence in said action, and that the action may be tried by the court, without a jury.

I.

That the defendant now is, and at all times hereinafter mentioned was, a corporation, duly organized and exist-

ing under and by virtue of the laws of the State of New York, and engaged in the business of writing life insurance, and making contracts, insuring the life of its patrons, in the State of New York and in the State of Idaho.

II.

That on the 17th day of July, 1889, the defendant insured the life of said Edward Jay Curtis, in the sum of six thousand dollars, and issued to him the policy of insurance, as set forth in plaintiff's complaint, and delivered said policy to him, while he was in good health; and that said Edward Jay Curtis paid the admission fee thereon; and that said policy is hereby admitted in evidence and is made a part of this stipulation.

III.

That on the 29th day of December, 1895, at Boise City, in Ada County, State of Idaho, the said Edward Jay Curtis, died; that Edward Jay Curtis died without leaving a will or testament.

IV.

That on the 27th day of January, 1896, J. K. Dubois was regularly and legally appointed, by an order duly entered and made in the probate court of said Ada county, and State of Idaho, as administrator of the estate of

said Edward J. Curtis, deceased; that thereafter, the said J. K. Dubois, duly qualified as such administrator, by giving a bond, as required by law, and taking the oath of office and entered upon the discharge of his duties as such administrator, and ever since, and still is such administrator, and acting as such.

V.

That the death of said Edward J. Curtis was not caused by his own hand, or by the effect of engaging in any duel, or any violation of the law, or at the hands of justice.

VI.

That said Edward J. Curtis did not enter any military service, or any naval service, company or regiment, when in actual service or otherwise, during his lifetime, or since the issuing to him of said policy of insurance.

VII.

That on or about February 4th, 1896, this plaintiff informed said defendant of the death of said Edward J. Curtis, and thereupon defendant denied all liability, whatsoever, on or under said contract of insurance.

VIII.

That the defendant has not paid the sum of six thousand dollars, as called for in said policy of insurance, nor any part thereof.

IX.

That the said Edward J. Curtis and the plaintiff, and each of them duly performed all the conditions of said policy of insurance, on their part to be performed, except as follows:

That said Edward J. Curtis failed to pay an assessment, or mortuary call, or premium, known as mortuary call No. 68, in the sum of $33.96, which become due according to the terms of said policy of insurance, on the first day of July, 1893; and that the same has not been paid by said Edward J. Curtis, or any other person or persons, for him; and that said non-payment was not condoned or acquiesced in by defendant; that other assessments, mortuary calls and premiums have become due and payable, since the said mortuary call No. 68, but none of them have been paid.

It is also stipulated and agreed, that Bennett W. T. Amsden, would testify in said action, if present, to the facts set forth in his affidavit, deposition or sworn statement herewith filed; and that the same, with the exhibits thereto attached, may be admitted in evidence, so far as it, said statement, is relevant and competent under

the pleadings in this action; and shall constitute a part of this agreed statement of facts.

A. A. FRASER and
GEO. H. STEWART,
Attorneys for Plaintiff.

HAWLEY & PUCKETT,
Attorneys for Defendant.

[Endorsed]: No. 127. In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the District of Idaho. J. K. Dubois, Plaintiff, vs. The Mutual Reserve Fund Life Association of New York. Stipulation of facts. Filed Dec. 19th, 1896. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the District of Idaho.

J. K. DUBOIS, As Administrator of the Estate of EDWARD JAY CURTIS, deceased.

Plaintiff,

against

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Defendant.

Affidavit of Bennett W. T. Amsden.

City and County of New York, ss.

Bennett W. T. Amsden being duly sworn, says, that he is forty-one years of age, resides in the city of New York, and is an officer, to-wit, the cashier, of the Mutual Reserve Fund Life Association, the defendant in the above entitled action, and has been in the employ of the said defendant for over ten years last past. That during the months of June, July, August, September, October, and November, 1893, he was assistant secretary of the Mu-

tual Reserve Fund Life Association, the defendant above named, in charge of the assessment department, and as such officer in charge of such department kept a record of the entire membership of the association, the amount of assessments such members were liable for and of the mailing of notices of the regular assessments upon such members, and also had entire charge of the preparation and mailing of such notices. That on or about the 1st day of June, 1893, a notice of the assessment known as mortuary call number 68, under the certificate or policy of Edward Jay Curtis, of Boise City, Idaho, numbered 86796, was securely enclosed in a postpaid sealed envelope, directed to the said Edward Jay Curtis, Boise City, Idaho, and as so sealed addressed and stamped was deposited in the general postoffice in the city of New York by this deponent at 5 o'clock in the afternoon of the 1st day of June, 1893, according to the usual course of business and the constitution or by-laws of such association, and the address upon such envelope to which said notice was sent was, and is, the last and only address of said Edward Jay Curtis appearing upon the books of such association; that the amount of said assessment was $33.96; that the said notice required the said Edward Jay Curtis to pay the sum of $33.96 on or before the first day of July, 1893; that said address is the same address to which all prior notices of assessments were sent to the said Edward Jay Curtis, and is the address to which the said Edward Jay Curtis directed that all notices under his certificate or policy should be sent, and

that all prior assessments under the said certificate or policy of the said Edward Jay Curtis had been paid, but that the said assessment due and payable on or before the first day of July, 1893, or within thirty days after the first day of June, 1893, and which was required to be paid by the notice aforesaid known as mortuary call number 68 has not been paid. That the regular course of business of the said association in the months of June, July, August, September, and October, 1893, in preparing, mailing and sending notices of assessments was as follows: That envelopes were addressed to each member of said association appearing upon the books of the association, and notice to each of said members with the amounts of their respective assessments was written by a clerk. They were then compared and verified, one clerk holding the book containing the list of members, with their policy numbers, amounts of their respective assessments and addresses, and another reading off the notices and envelopes. The notices were then folded and enclosed in their respective envelopes, sealed, stamped and rgistered in regular numerical order, and when so sealed and stamped were checked upon the books of the association, one person calling the number of the policies, and the names and addresses from the envelopes, and another checking from the book as they were called, and as often as they were called they were deposited in a United States mail bag furnished to the association by the postal authorities for that purpose, all being done under my personal supervision. The mail bag was then

deposited in the general postoffice of the city of New York by myself. This course was followed with reference to the assessment under the said mortuary call number 68, and with reference to the notice of said assessment mailed to Edward Jay Curtis, as aforesaid. No notice of assessment was sent to the said Edward J. Curtis subsequent to that of said mortuary call number 68, nor was the said Edward Jay Curtis ever reinstated as a member of said association, but a notice that his said certificate or policy had lapsed, and stating conditions under which it might be reinstated, together with a blank form of application for reinstatement was enclosed in a sealed, post-paid wrapper directed to said Edward Jay Curtis, Boise City, Idaho, and deposited by me in the general postoffice of the city of New York on the 18th day of July, 1893, according to the usual course of business of such association, such notice being called a delinquent notice. A true and correct copy of the notice mortuary call number 68, sent to Edward Jay Curtis under his certificate or policy number 86,796, as hereinbefore testified by me, and a true and correct copy of the envelope in which the same was enclosed, addressed and mailed to the said Edward Jay Curtis aforesaid, and a true and correct copy of said delinquent notice, and of the envelope containing the same so addressed and mailed as aforesaid, and of the blank form of said application for reinstatement enclosed therein are hereto attached and made part of this affidavit, and marked "Exhibits A, B, C, D, and E," respectively.

B. W. T. AMSDEN,

Subscribed and sworn to before me this 2nd day of December, 1896.

SEWELL T. TYNG,
Notary Public, N. Y. Co. No. 66.

State of New York,
City and County of New York, } ss.

I, Henery D. Purroy, clerk of the city and county of New York, and also clerk of the Supreme Court for the said city and county, the same being a court of record, do hereby certify, that Sewell T. Tyng, before whom the annexed deposition was taken, was, at the time of taking the same, a notary public of New York, dwelling in said city and county, duly appointed and sworn, and authorized to administer oaths to be used in any court of said State, and for general purposes; and I am well acquainted with the handwriting of said notary, and that his signature thereto is genuine, as I verily believe.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court and county, the 2 day of Dec., 1896.

[Seal] HENERY D. PURROY,
Clerk.

Members in making their p

☞In writing to the Assoc

Mutual Reser

Pot

Herewith please find

in payment of Mortuary Call
acknowledge receipt of same.

Was this Notice addressed

If not properly addressed, please fill
your books, and send future noti

No. of Street,.....

County of.....

AD

Members desiring to pay six months or
and proper receipts will be furnished. To de
multiply the same by the number of thousand
payments ; but should the mortality of the A
fund, through the payment of said maximum
year. This payment must be made to the H
ized to collect the same.

TABLE OF MAXIMUM MORT

These Rates

AGE.	1 AVERAGE AMOUNT WHICH MAY BE COLLECTED EVERY TWO MONTHS.	2 MAXIMUM OR LARGEST AMOUNT WHICH CAN BE COLLECTED ANNUALLY.
25	$1 80	$10 76
26	1 81	10 84
27	1 82	10 93
28	1 84	11 03
29	1 86	11 13
30	1 87	11 24
31	1 89	11 35
32	1 91	11 48
33	1 94	11 63
34	1 96	11 77
35	1 99	11 93
36	2 02	12 12

ere we have no authorized collector, an Express Money Order, which costs you but 5 cents for amounts of $5.00 or under, can be at any office of the American, National, United States, Wells, Fargo & Co.'s, Pacific, or Northern Pacific Express Companies. simple and satisfactory remittance for the insured and the most convenient for this office. Please send your remittances in this and always make orders payable to the Association.

NOTICE.-

M

This Associatio
nd $102,325.57 with
the payment of
IDOWS, ORPHAN

Our Surpl

POLICY

No. 8679

	Month.	Day.
D.	7	17

Exhibit A

If errors occur, or communications remain unanswered, address E. B. HARPER, President, stating particulars.

June 1st, 1893.

NOTICE.—MORTUARY CALL No. 68 PART I.

Exhibit A Curtis Dep. 1-31-96

Mutual Reserve Fund Life Association,

Potter Building, 38 Park Row, New York.

This Association has $200,000.00 deposited with the Insurance Department of the State of New York and $102,325.57 with Canada Insurance Department, for the exclusive benefit of its members and as a guarantee of the payment of its certificates in full, and it has already paid more than $15,500,000.00 in cash to the WIDOWS, ORPHANS and representatives of its deceased members.

Our Surplus Reserve or Emergency Fund is Over $3,425,000.00.

New York, June 1st, 1893.

POLICY No.	Month.	Day.	Mr.	MORTUARY CALL No. 68. $	cts.
86796	7	17	Edward J Curtis, Idaho	33	96

D. D.

Please take notice that an Assessment or Mortuary Call is hereby made upon you pursuant to the order of the Executive Committee of the Association, for the above amount, *to be paid within thirty days from the date of this notice,* in accordance with the conditions of your certificate or policy and the Constitution or By-Laws of the Association.

The above payment must be made on or before **July 1, 1893**, at the Home Office of the Association in the City of New York, or to its duly authorized local Treasurer, whose name is stamped upon this notice, and who is furnished with a receipt signed by the Treasurer of the Association. If the same is not paid within the time stated, the policy and all payments thereon will become forfeited and void, and your membership with the Association will expire with all rights thereunder.

Notice is hereby given that the further regular stated Assessments or Mortuary Calls, each for at least an amount equal to the amount of this Assessment or Mortuary Call, are hereby made upon you, which will be due and payable, the first within thirty days from the first day of August, 1893, and the other within thirty days from the second day of October, 1893, the cause and purposes of this and of each of said further regular stated Assessments or Mortuary Calls being as provided in Article V, Section 1, of the Constitution, as follows:

"The Mortuary Department shall be distinct from the other Departments of the Association, and all moneys received from the Mortuary Calls, less the cost of collecting, shall pass through said department, and after deducting expenses thereof, governmental taxes, legal and other expenses in defending or protecting the Association against the payment of unaudited or fraudulent claims, shall be deposited by the Treasurer, in Banks or Trust Companies designated by the Board of Directors, to an account to be known as 'The Mortuary Account of the Mutual Reserve Fund Life Association,' and shall only be withdrawn from said account by transfer on the order of the President and Treasurer to the 'Reserve Fund,' or for investment in such securities as may be required by the laws relative to deposits to secure admission for the transaction of business by the Association, as may be approved by the Board of Directors of the Association, and which securities shall be deposited, as required by Article XI, Section 2, of the Constitution; or in settlement of death claims under the certificates of the Association, said claims having been first approved by the Executive Committee of the Association."

The inclosed Part II, which is a part of this notice, states amount paid on last death claim paid; the name of the deceased member and maximum face value of the certificate or policy, which was paid in full.

The Constitution or By-Laws provide: "On the first week day of the months of February, April, June, August, October, and December of each year, an assessment shall be made upon the entire membership in force, at the date of the last death of the audited death claims, prior thereto, for such a sum as the Executive Committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member."

Provision for Limiting the Cost to the Maximum Rates at Age of Entry.

The following resolution was offered at the Annual Meeting of Members, held January 23, 1889, by General Isaac H. Shields, of Philadelphia, Pa., and, after full discussion, unanimously adopted:

WHEREAS, The Mutual Reserve Fund Life Association was established upon the natural premium system of life insurance, which requires the members to pay simply their proportion of the death claims, with thirty-three per cent. additioonal thereto, (which is equivalent to 25 per cent. upon the gross) which additional sum has for its object the creation of a reasonable surplus reserve emergency fund to provide against unforeseen contingencies, its foundation principles being in opposition to accumulations of vast sums of money taken from the pockets of the policy holders; and,

WHEREAS, The aforesaid surplus reserve emergency fund is rapidly increasing, and has already reached the enormous sum of $1,885,000; therefore,

Resolved, That in the event any sums are hereafter required for the payment of death claims, in excess of the sums realized from current bi-monthly mortuary premium calls at the maximum rates at age of entry established by the Association, that are applicable to the death claims in excess of the sums realized by the Association, that are applicable to the death claims (which rates are based upon the American Table of Mortality with 33 per cent. loading for the Reserve Fund), the Board of Directors shall have power to pay such death claims in excess thereof from the current receipts that are applicable to the surplus reserve emergency fund, provided that said surplus reserve emergency fund shall always be maintained [illegible] with the provisions of the Constitution or By-Laws.

The sending of this notice or acceptance of the above premium shall not be held to waive any forfeiture caused by non-payment of any previous sum when due, under said certificate or policy.

Remittances must be by valid Draft, Check, Post Office or Express Money Order, payable to the order of the Association, by mail or payments made to any person whose name is not officially stamped on this notice, is unauthorized and at the member's own risk. Agents or local Treasurers are not authorized to make, alter or discharge contracts, grant credits or waive forfeitures.

You are respectfully urged to remit the amount at once and not wait until the expiration of the time, thereby avoiding the expiry of your insurance.

Please return this notice when you send remittance, also notify the Association of any change in your post office address.

The above Mortuary Call is NOW due, and should be PAID AT ONCE.

If not paid on or before **July 1, 1893**, the Policy will *expire* and become and be *null* and *void*. **All remittances** to be made payable to the order of the **Mutual Reserve Fund Life Association.**

F. T. BRAMAN, Secretary.

E. B. HARPER, President.

NOTICE.—If the name of an Authorized Local Treasurer is not stamped on this notice payment must be made to the Home Office of the Association, in New York.

Members in making their payments will please fill up and RETURN this notice.
☞In writing to the Association always give the number of Policy.☜

Dated at..... 189

Mutual Reserve Fund Life Association,

Potter Building, 38 Park Row, New York.

Herewith please find inclosed.....Dollars in payment of Mortuary Call No. **68** *on my Policy No..... Will you please acknowledge receipt of same.*

Was this Notice addressed correctly? (answer yes or no.).....

If not properly addressed, please fill up and sign the following order, viz.: **Please change my address upon your books, and send future notices to my present Post Office, as follows:**

No. of Street,.....Name of Post Office.....

County of.....State of.....

Name.....

ADVANCE PAYMENTS.

Members desiring to pay six months or a year in advance, can do so by remitting the maximum rates, as stated in the tables, and proper receipts will be furnished. To determine the correct amount, see the annual maximum rate at the age of entry, multiply the same by the number of thousands of insurance carried, the result will be the proper amount for one year's mortuary payments; but should the mortality of the Association during the year call for a smaller sum than the amount paid to the death fund, through the payment of said maximum rates, the excess paid will be applied to future payments after the expiration of the year. This payment must be made to the HOME OFFICE or to a regular authorized Local Treasurer. **Agents are not authorized to collect the same.**

TABLE OF MAXIMUM MORTUARY PREMIUMS FOR EACH $1,000 OF INSURANCE.

These Rates include the 25% for the Reserve or Emergency Fund.

AGE.	1 AVERAGE AMOUNT WHICH MAY BE COLLECTED EVERY TWO MONTHS.	2 MAXIMUM OR LARGEST AMOUNT WHICH CAN BE COLLECTED ANNUALLY.	LEVEL PREMIUM RATES, WHICH ARE MORE THAN DOUBLE THE AMOUNT REQUIRED TO PAY THEIR DEATH CLAIMS IN ANY YEAR DURING THE PAST FORTY YEARS.	AGE.	1 AVERAGE AMOUNT WHICH MAY BE COLLECTED EVERY TWO MONTHS.	2 MAXIMUM OR LARGEST AMOUNT WHICH CAN BE COLLECTED ANNUALLY.	LEVEL PREMIUM RATES, WHICH ARE MORE THAN DOUBLE THE AMOUNT REQUIRED TO PAY THEIR DEATH CLAIMS IN ANY YEAR DURING THE PAST FORTY YEARS.
25	$1 80	$10 76	$19 89	43	$2 37	$14 24	$35 05
26	1 81	10 84	20 40	44	2 43	14 60	36 46
27	1 82	10 93	20 93	45	2 5..	14 96	37 97
28	1 84	11 03	21 48	46	2 57	15 43	39 58
29	1 86	11 13	22 07	47	2 67	16 00	41 30
30	1 87	11 24	22 70	48	2 78	16 68	43 13
31	1 89	11 35	23 35	49	2 91	17 48	45 09
32	1 91	11 48	24 05	50	3 06	18 37	47 18
33	1 94	11 63	24 78	51	3 41	20 45	49 40
34	1 96	11 77	25 56	52	3 78	22 70	51 78
35	1 99	11 93	26 38	53	4 16	24 95	54 31
36	2 02	12 12	27 25	54	4 53	27 20	57 02
37	2 05	12 32	28 17	55	4 91	29 45	59 91
38	2 09	12 55	29 15	56	5 28	31 70	63 00
39	2 13	12 79	30 19	57	5 66	33 95	66 29
40	2 20	13 17	31 30	58	6 03	36 20	69 82
41	2 25	13 52	32 47	59	6 41	38 45	73 60
42	2 31	13 88	33 72	60	6 78	40 70	77 63

The maximum or largest amount above stated is based upon the Mortality Table and the experience of the Association, and is for current ages.

☞ **THE MUTUAL RESERVE FUND LIFE ASSOCIATION offers ONE THOUSAND DOLLARS REWARD for the Name of any honest death claim due and unpaid which it has not paid in full, the fact to be determined by any two Bank Presidents in New York City, and to cover the entire history of this Association.**

OFFICIAL EXAMINATIONS.

The books and accounts of the Mutual Reserve Fund Life Association have been examined within the past ten years by the following INSURANCE COMMISSIONERS, and after each of said examinations a complete indorsement has been given, certifying that the books were correctly kept, the income properly applied, and every honest death claim promptly paid in full:

Hon. John A. McCall, Insurance Commissioner, New York.
" **Eugene Pringle**, Insurance Commissioner, Michigan.
" **H. J. Reimmund**, Superintendent of Insurance, Ohio.
" **Chas. Shandrew**, Insurance Commissioner, Minnesota.
" **Philip Cheek, Jr.**, Insurance Commissioner, Wisconsin.
" **Elisha W. Buckiin**, Insurance Commissioner, Rhode Island.
" **E. W. Knott**, Deputy Superintendent and Examiner, Missouri.
" **Aug. F. Harvey**, Actuary, Missouri.
" **A. L. Carey**, Commissioner of Insurance of North Dakota.
Hon. Louis B. Schwanbeck, Insurance Commissioner, Colorado.
" **M. H. Dyer**, Examiner Insurance Department, W. Virginia.
" **Lucius McAdam**, Actuary, West Virginia.
Price, Waterhouse & Co., Chartered Accountants, of London, England.
Hon. Elizur Wright, Actuary and Ex-Insurance Commissioner of the State of Massachusetts.
" **W. G. Hayden**, Actuary of the Insurance Department, North Dakota.

In addition to the various examinations by the above INSURANCE COMMISSIONERS, nearly ONE HUNDRED other Examinations have been made by Committees of Policy-Holders from the various sections of our country, Bank Experts, Actuaries, Accountants, Auditors and others, and in each instance complete Indorsements have been received by the Association.

At places where we have no authorized collector, an Express Money Order, which costs you but 5 cents for amounts of $5.00 or under, can be obtained at any office of the American, National, United States, Wells, Fargo & Co.'s, Pacific, or Northern Pacific Express Companies. It is a safe, simple and satisfactory remittance for the insured and the most convenient for this office. Please send your remittances in this manner, and always make orders payable to the Association.

☞ How to Remit.

Exhibit B.

Aff't. of B. W. T. Amsden, Dec. 2nd, 1896. S. T. Tyng. Mutual Reserve Fund Life Association, Potter Building, 38 Park Row, New York E. B. Harper, President. Edward J. Curtis, Boise City, Idaho. Mortuary Call. Please forward if away.

243 R-6-95-9139.

☞ **PLEASE RETURN THIS WITH YOUR REMITTANCE.**

Mutual Reserve Fund Life Association,

(INCORPORATED)

MUTUAL RESERVE BUILDING, BROADWAY & DUANE ST.

. HARPER, Founder. F. A. BURNHAM, President.

New York, July 18th 1893

Mr. Edward J. Curtis,

Will you please inform us by return mail whether or not you ve paid the Annual Dues and Mortuary Call No. 68

your Policy No. 86796 *amounting to $* 51.96.

Annual Dues, $ 18.00 *Due,* July 1, 1893

Mortuary Call, $ 33.96 *Due,* June 1, 1893

Our books show that the above Annual Dues and Mortuary Call remain paid, and that your policy has expired.

If you have paid or remitted the above, please state actual date of same, ether it was by check or otherwise, to whom paid or remitted; and if you ve a receipt for such payment, the name of the person signing or counter-ning same, together with the date of the receipt.

Remittances are frequently received without advice as to name of the mber remitting the same, or number of the policy to which credit should be ven; hence the correct credit cannot be made to the member making the pay-nt.

If through an oversight or misunderstanding the above has not been id, and you should desire to reinstate your policy, you may be reinstated on furnishing the Association with a satisfactory Application for Reinstate-nt and Warranty of Health, and under the conditions thereof and subject the approval of the Executive Committee, and payment of amount of your ues and Mortuary Call as above.

The signature of the member to the application for reinstatement must be rtified to by some responsible person.

In any case, when the Association deems it necessary, a medical examination ll be required.

The sending of this notice shall not be held to waive any forfeiture or piration of said policy caused by non-payment of any amount when due.

CHARLES W. CAMP,

J. J. Braman *Secretary.*

Name, ...

y P. O. Address is .....

Was this notice addressed correctly? .....

We always regret to learn that misfortune has overtaken any one, an especially those of our own number, who have been members of the Associatio

The blotting out of an estate, or the taking away of the protection to one family, of one or more thousand dollars, is certainly a misfortune.

We should be much pleased to have your name continued among ou present army of one hundred thousand members, and it is with pride that w call your attention to the fact that this Association has already paid ove Twenty-three Million Dollars in Cash to the widows and orphans of i deceased members, also to the fact that it has now on hand more than Thr and Three-quarters Millions of Dollars in its Cash Surplus Reserve an Emergency Funds.

Mortuary Calls are made upon the members of the Association on th first week day of the months of February, April, June, August, October an December of each year.

All Mortuary Calls are due and payable at above dates respectively, an must be paid within thirty days of such dates, or the policy will expire.

Annual Dues are due and payable on the date stated in the policy (wit out grace).

Members should pay their Mortuary Calls and Dues promptly, whethe they receive notice or not, as they can tell from the above the exact time pa ments become due.

Mortuary Calls and Annual Dues are payable **only** *at the* **Hom Office** *of the Association, in the City of New York, or to an* **Authorize Local Treasurer, whose name is stamped on the notice,** *who is fu nished with a receipt signed by the Treasurer of the Association, which mu be duly countersigned.*

Remittances must be by Draft, Check, Post Office or Express Mon Order; cash sent by mail, or payments made to Agents, or other persons who names are not stamped on the notice, are unauthorized and at the **member own risk.**

Agents or Local Treasurers are not authorized to make, alter or discharg contracts, extend credits or waive forfeitures.

Members desiring to pay in advance can do so at the maximum rates, an they will be credited with such sums, thereby avoiding the liability of forfe ing their insurance through oversight, absence, or negligence of parti entrusted with making the payments. In case of the death of a member, t excess of an advance payment, if over and above the sum required for Du and Mortuary Calls, will be returned.

Advance payments must be made to the Home Office, or to a regular authorized Local Treasurer.

Agents are not authorized to receive the same.

[OVER.]

Exhibit "D."

Aff't. B. W. T. Amsden Dec. 2nd 1896. S. T. Tyng. Mutual Reserve Fund Life Association. Potter Building, 38 Park Row, New York, E. B. Harper, President. Mortuary Call. Please forward if away. Edward J. Curtis, Boise City, Idaho.

Exhibit "E."

Aff't. B. W. T. Amsden. Dec. 2nd. 1896.

S. T. Tyng,

Application for Re-instatement of Membership and Warranty of Health.

To the Mutual Reserve Fund Life Association,
Potter Building, 38 Park Row, New York.

Whereas, a certain payment as hereinafter named under Policy No. .... for $....., issued to me, became due, and payable, viz: Mortuary Call No. ..... due on the ..... day of ....., 189.., for $.....

Annual dues ..... due on the ..... day of ..... 189.., for $..... and by reason of the non-payment of said Mortuary Call or Dues, or both of them, when due, my membership and said policy expired.

Now, therefore, I, ...
of ..... aged ..... years at last birthday, by occupation ..... do hereby, by reason of

said expiry, make application to the Mutual Reserve Fund Life Association for reinstatement of my membership and of said Policy, and tender the amount of the past due payment as above, and in consideration thereof I agree as follows:

First.—I warrant that I am on this .... day of ..... 189.., of temperate habits, in good health, and free from all diseases and infirmities, and further, that, since the date of my original application for said membership and policy, I have not had any disease, injury, infirmity or illness, or had or sought any medical attendance or advice for any illness, disease or injury, except as herein stated in writing, viz.

....
....
....

Second.—I hereby agree that if any of the statements and warranties in said original application or herein, are not full, complete and true, that the acceptance by the Association of the above or any subsequent payment shall not reinstate my membership under said policy or create or continue any liability on the part of the association by reason of such payment.

Third.—I further agree that the acceptance of the above payment, after the same became due, shall not establish a precedent for the acceptance of the payment of future assessments or dues to the Association, nor shall any subsequent payment of the same upon said policy be deemed a waiver of this expiry or impair, waive, alter or

change any of the conditions of this Agreement or of said Policy; and I further agree that this agreement and warranty shall be and hereby is made part of my contract with said Association, under said policy, and the same shall be subject thereto.

Dated at ..... this ..... day of ..... 189..

Witness of signature .....

Occupation of Witness .....

Address .....

.....

Signature of Applicant.

NOTICE. If the applicant has had any illness, or has consulted, or been attended by any physician since the date of the original application for above Policy he is required to obtain the written statement of such physician on the back hereof, stating the nature, date ,duration of such illness, and in such cases the Policy shall not be reinstated until the application for re-instatement shall be approved by the Executive Committee of the Association in New York. Remittances must be made by valid draft, check, postoffice or express money order; cash sent by mail or payments made to agents or other persons whose names are not stamped on the notice are unauthorized and void and at the member's own risk. Agents, collectors, or local treasurers are not authorized to waive forfeitures, extend credit or reinstate lapsed members.

If for Mortuary only, strike out line Annual Dues, and if for Dues only, strike out Mortuary.

CERTIFICATE OF APPLICANT'S PHYSICIAN.

I, ... M. D., a practicing physician, do

hereby certify that I am personally acquainted with the applicant who signed the application and certificate on the reverse side hereof, and that I have personally known said applicant for ..... years last past, and that I was consulted by said applicant or attended him from ..... 18...., to ....., 18...., for*

....

....

....

Have you been consulted by or attended applicant for any ailment, disease or illness, other than stated above within the past five years?

If yes, when and for what?.....

....

....

I hereby certify, upon my honor as a physician, that the above is a full, complete, and true statement.

Dated at ..... Signed ..... M. D.

this ..... day of ....., 189.. P. O. Address.....

....

....

* Please state fully the nature, date, duration and severity of the disease or illness for which you attended applicant or was consulted by him.

[Endorsed]: No. 127. In the Circuit Cout of the U. S. Ninth Judicial Circuit, in and for the Dist. of Idaho. J. K. Dubois as Administrator of the estate of Edward J. Curtis, Plaintiff, vs. The Mutual Reserve Fund Life Association, Defendant. Statement of Bennett W. T. Amsden Filed Dec. 19th, 1896. A. L. Richardson, Clerk.

In the United States Circuit Court for the District of Idaho.

J. K. DUBOIS, As Administrator of the Estate of EDWARD JAY CURTIS, deceased.

Plaintiff,

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Defendant.

Judgment.

This cause came on regularly for trial at the December, 1896, term, A. A. Fraser and Geo. H. Stewart, Esqrs., appearing as counsel for plaintiff, and Messrs. Hawley and Puckett for defendant; the cause was tried before the Court, sitting without a jury, upon an agreed statement of facts, and the evidence being closed and after argument by counsel the cause was submitted to the Court for consideration and decision and after due deliberation thereon, the Court delivered its decision in writing which is filed, and orders that judgment be entered in accordance therewith in favor of plaintiff and against defendant, as demanded in the prayer of the complaint in said cause.

It is therefore by virtue of the law and by reason of the premises aforesaid, ordered and adjudged that the said plaintiff, J. K. Dubois, as administrator of the estate of Edward Jay Curtis, deceased, do have and recover of and from the said defendant, the Mutual Reserve Fund

Life Association, the sum of six thousand dollars with interest thereon at 10 per cent per annum from Feb. 10, 1896, amounting in all to the sum of six thousand five hundred and thirty dollars ($6530.00) together with his costs herein to be taxed and that execution issue therefor. Costs taxed at $40.70. Judgment entered, Dec. 28th, 1896.

JAS. H. BEATTY,
Judge.

In the United States Circuit Court for the District of Idaho.

J. K. DUBOIS, Administrator,
Plaintiff,
vs.
MUTUAL RESERVE FUND ASSOCIATION,
Defendant.

A. A. Fraser and Geo. H. Stewart, Attys. for Plff., and Hawley & Puckett, Attys. for Deft.

Opinion.

The facts in this case upon which its decision depends are: That July 17th, 1889, the defendant issued its policy of life insurance to Edward J. Curtis, who died December 29th, 1895, and of whose estate plaintiff is administrator; that by the policy it is provided that mortuary premiums should be paid by the assured "within thirty days from the first week day of the months of February, April, June ..... of each and every year," and by the tenth

provision attached to, and by the policy made a part thereof, that "This contract shall be governed by, subject to and construed only, according to the laws of the State of New York"; that by a law of said State, enacted May 23rd, 1877, and still in force, it is provided that: "No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premiums or interest, or any portion thereof, except as hereinafter provided. Whenever any premiums or interest due upon any policy shall remain unpaid when due, a written or printed notice stating the amount of such premiums or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable shall be duly addressed and mailed to the person whose life is assured or the assignee of policy, if notice of the assignment has been given to the company at his or her last known post-office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premiums. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or a duly appointed agent or other person authorized to collect such premiums within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the pay

ment of said premiums or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice; provided, however, that a notice stating when the premiums will fall due, and if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect at the service of the notice hereinbefore provided for." That defendant issued to the assured its notice or mortuary call No. 68, dated New York, June 1st, 1893, and claims to have mailed it the same day, by which it notified the assured, "that an assessment or mortuary call is hereby made upon you" for the sum of $33.96, "to be paid within thirty days from the date of this notice—That above payment must be made on or before July 1st, 1893,—The above mortuary call is now due, and should be paid at once. If not paid on or before July 1st, 1893, the policy will expire and become null and void."

It may be added that the assured duly performed all the conditions of said policy prior to the payment of the premium last referred to which he failed to pay, nor did he pay anything on said policy thereafter, and that the notice served by defendant concerning said call No. 68, was in due form and duly served unless not in time, and that it served no other notice concerning this or any other premiums or dues, except one on July 18th, 1893, to ask the assured whether he had paid such premiums and

some other dues, and to notify him that his policy had lapsed because of his failure to pay said premium.

No doubt has been suggested that this policy must be construed by the New York statutes. The defendant so provided by its policy; the assured acquiesced, and plaintiff now invokes such construction. It is held that "The adjudications of the highest court of the State (New York) treat it (the statutes above) as one which must be strictly interpreted in favor of the assured, and hold that the defense of a forfeiture through nonpayment of premium is not availing to an insurance company, if there has been any departures on its part from the provisions of the statute in regard to notice": Hicks v. National Life Ins. Co., 60 Fed. 692, and cases therein cited.

It will be observed that, by the foregoing statute, there are two provisions by which notice for the payment of premiums may be given: By the first the company, after the premium became due mails its notice to the assured requiring payment "within thirty days after the mailing of such notice," and by the second, to give its notice in similar manner "at least thirty, and not more than sixty days prior to the day when the premium is payable."

The defendant's said notice says in one place that this premium is due now—June 1st, but the policy says it should be payable within thirty days from the first week day of June—Thursday, June 1st; the 7th paragraph of defendant's answer alleges it became due and payable on the first day of July, and the same appears by the 9th paragraph of the stipulated facts. Moreover a debt is

not due until such time as its payment can be demanded or enforced.

It is beyond question that the assured was under no obligation to pay this premium until thirty days after June 1st, which could not be before July 1st.

It is evident that the premium became due on July 1st; that the defendant so regarded it and that it attempted to give its notice in pursuance of the second provision of the statute which requires that it should be given at least thirty days prior to the day when payable and to state when it would become due. Now, admitting that the notice was in due form, although somewhat contradictory in its statements as to the time when the premiums became due, and that it was duly served on June 1st, was such service at least thirty days prior to July 1st, is the important question for decision. The rule by which time is computed in such cases has been termed the "controversia controversissima." While great diversity of views existed in the early rulings, it is said that by the current of modern authorities the rule, "when time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, it is to exclude the day thus designated and to include the last day of the specified period": Sheets v. Seldins, Lessees, 2 Wall. 190; but while modern authorities may have agreed upon this rule, they do not seem to have agreed upon the same interpretation of it.

In the last cited case the contract provided that if rent "remained unpaid for one month from the time it shall

become due," which was May 1st, the lease should become forfeited. Demand for payment was made on June 1st.' The question presented was that a lunar and not a calendar month was meant, and that the demand came too late and the court in holding that it was a calendar month, stated in general terms the rule above quoted.

By a California statute it is provided that in certain election contests a notice should be served "at least three days before such trials"—it was held that notice served on the 7th—trial on the 10th—was in time: Misch v. Mayhero, 51 Cal. 514, also, to same effect is Bates v. Howard, 105 Cal. 182. So in case of a statute requiring the "giving not less than ten days previous notice thereof," by publication, it was held that a notice published on May 16th of an election on the 26th, was sufficient: Brady v. Moulton, 63 N. W. (Minn.) 489. Numerous other similar authorities might be quoted, all of which it may be, are more or less controlled by statute similar to that in California, which provides that "The time in which any act provided by law is to be done, is computed by excluding the first day and including the last," which is likewise the law in this State. But to the contrary is the 60 Fed. 692, ante, in which the facts are like those here, and with the construction of the same statute involved. The Court says: "The notice in the present case, having been given before the time when the premium was payable by the contract, should have been served at least 30 days prior to the 2nd day of December. If, according to the meaning of the statute, the mailing of that notice upon the 2nd day of November was not a notice of at least thirty

days, the notice was insufficient. It has always been the rule in New York in applying statutes in which a computation of time is to be made from the day on which an act is to be done, to exclude the day. Thus in Small v. Edrich, 5 Wend. 137, the statute was that notice should be served "at least fourteen days before the first day of court," and the notice was served on the 9th day of November, the 23rd day of the same month being the first day of the court; and it was held that this was notice of only thirteen days, and after quoting 2 Wall. 190, ante, as supporting its view it further says: "Excluding, as must be done according to the authorities, the day of mailing in the computation in the present case, the notice was served by the defendant 29 days, and not "at least thirty," prior to the time when it should have been in order to effectuate the forfeitures. The defendant is in no better position than it would be, if no notice had been mailed." This is by the 2nd C. C. of Appeals, an authority so high that this court feels justified in following it, notwithstanding other apparently contrary rulings.

In conclusion it may be added that no fixed rule will govern all cases, but in each attention must be given to the particular language to be construed. In this case the assured was entitled to at least 30 days notice prior to the day of payment. The notice was served at 5 P. M. June 1st, to 5 P. M. July 1st, would be 30 days, but there can be no hesitation in holding that no part of June 1st can be included as a part of the 30 days notice—they can-

not commence until after 12 P. M. June 1st and could not end until after 12 P. M. July 1st or until the beginning of July 2nd. It is therefore held that the notice was not served in time; that failure to pay the premium did not operate the forfeiture of the policy and judgment for plaintiff is ordered.

December 28th, 1896.

BEATTY,
Judge.

[Endorsed]: No. 127. J. K. Dubois, Administrator, etc., vs. Mutual Reserve Fund Life Association. Opinion. Filed December 28th, 1896 A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial District, in and for the Central Division of the District of Idaho.

J. K. DUBOIS, As Administrator of the Estate of EDWARD JAY CURTIS, deceased.

Plaintiff,

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION OF NEW YORK, a Corporation,

Defendant.

Defendant's Bill of Exceptions.

Be it remembered that this cause came duly on to be heard, before the court, without a jury, a jury being waived expressly by both parties, on the day of December, 1896, A. A. Frazer, Esq., appearing as attorney for the plaintiff, and Hawley & Puckett appearing as attorneys for defendant; and thereupon an Agreed Statement of the Facts in the case, was made in writing and submitted to the Court, as the evidence in the cause; said agreed statement being as follows, to-wit:

[Here follows a copy of said Agreed Statement, and same already appearing in this Transcript (pp. 45 to 49),

and herein fully stated and set forth, is for that reason not again herein inserted.]

Statement of Bennett T. Amsden.

[Here follows a copy of said statement of Bennett W. T. Amsden, together with the Exhibits thereto attached, and therein mentioned and stated, and the same already appearing in this Transcript (pp. 50 to 54), and herein fully stated and set forth, is for that reason not again here inserted.]

Exhibit A.

[Here follows a copy of the Policy of Insurance in this case offered and admitted in evidence on the trial thereof, as one of the defendant's exhibts therein, and a copy thereof being attached to and made a part of the complaint herein, and already appearing in this Transcript (pp. 55 to 56), is for that reason not again inserted..

Argument of counsel was had, and whereupon the Court having fully considered the evidence herein, makes and files his decision as follows, to-wit:

Decision.

[Here follows a copy of the said decision, and the same already appearing in this Transcript (pp. 65 to 73), and herein fully set forth and stated, is for that reason not again here inserted.].

Whereupon the defendant by its counsel, duly excepted to the decision upon the grounds that it was against law and against the weight of the testimony in the cause, and not warranted by the testimony of the cause.

And the defendant now asks that this, its bill of exceptions be signed settled and allowed as a part of the record herein.

HAWLEY & PUCKETT,
Attorneys for Defendant.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the District of Idaho.

J. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, deceased.
Plaintiff,
vs.
MUTUAL RESERVE FUND LIFE ASSOCIATION, a Corporation,
Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto, that the exhibits attached to the affidavit of Bennett W. T. Amsden and marked A, B, C, D, and E, on file in this cause may

be considered, and are hereby made a part of this bill of exceptions with the privilege of supplying and attaching certified copies thereof to said bill of exceptions at any time if deemed necessary or proper.

ALFRED A. FRASER,
Attorney for Plaintiff.
HAWLEY & PUCKETT,
Attorneys for Defendant.

The above and foregoing bill of exceptions is hereby settled and allowed this 13th day of April, 1897.

JAS. H. BEATTY,
Judge.

[Endorsed]: In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the District of Idaho. J. K. Dubois as Administrator of the Estate of Edward Jay Curtis, Deceased, Plff. vs. The Mutual Reserve Fund Life Association, a Corporation, Deft. Stipulation. Filed Jan. 7th, 1897. A. L. Richardson, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the State of Idaho.

J. K. DUBOIS, as Administrator of the Estate of Edward Jay Curtis, Deceased,

Plaintiff.

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Defendant.

Petition for Writ of Error.

The petition of the Mutual Reserve Fund Life Association, a corporation, and defendant in the above entitled action, respectfully shows:

That feeling itself aggrieved by the decision and judgment made entered thereon in said action on the 28th day of December, A. D. 1896, whereby it was ordered and adjudged that the plaintiff do have and recover of and from the defendant the sum of six thousand five hundred and seventy dollars and seventy cents, comes now through and by its attorneys, Messrs. Hawley and Puckett, and its counsel, I. B. L. Brandt, Esqr., and re-

spectfully petitions and prays this Court for the allowage of a writ of error from said decision and judgment to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, under and according to the laws of the United States in that behalf made and provided; and also, that an order be made fixing the amount of security and bond which defendant should give and furnish upon said writ of error, and directing that upon the giving of said security and bond all further proceedings in this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and prays, that a transcript and record of the proceedings in the cause, duly authenticated, may be transmitted to said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit.

Your petitioner and plaintiff in error herewith presents and files with the clerk of this Honorable Court its Assignment of Errors.

And your petitioner and plaintiff in error will ever pray.

HAWLEY & PUCKETT,
Attorneys for Petitioner and Plaintiff in Error.
I. B. L. BRANDT,
Of Counsel.

Upon reading and filing the foregoing petition, and assignment of errors, it is hereby ordered that the prayer of said petitioner and plaintiff in error be allowed, and that a writ of error to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, be allowed and issued herein as prayed for.

Dated, June 21st, 1897.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 127. In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the State of Idaho. J. K. Dubois, as Administrator, etc., Plaintiff, vs. Mutual Reserve Fund Life Association, Defendant. Petition for Writ of Error and Order of Court allowing the same. Filed June 21st, 1897. A. L. Richardson, Clerk.

Hawley and Puckett, Attorneys for Defendant and Plaintiff in Error. I. B. L. Brandt, of Counsel.

In the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit.

J. K. DUBOIS, as Administrator of the Estate of Edward Jay Curtis, Deceased.

Defendant in Error.

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Plaintiff in Error.

Assignment of Errors.

Now comes the Mutual Reserve Fund Life Association, the defendant and plaintiff in error herein, by Messrs. Hawley and Puckett, its attorneys, and I. B. L. Brandt, its counsel, and upon the records and proceedings in this case, particularly specifies the following as the errors upon which it will rely and will urge upon its writ of error in the above entitled cause, to-wit:

I.

That the said Circuit Court of the United States, for the Central Division of the State of Idaho, erred in deciding that the laws of the State of New York of 1876, as

amended in 1877, and under which it held that the notice given the deceased of the levying of the assessment or mortuary call No. 68, was not given in time, applied to the defendant corporation.

II.

That the said Court erred in deciding, that the said laws of the State of New York, of 1876, as amended in 1877, applied to insurance companies which like the corporation defendant do business and operate upon the assessment plan.

III.

The said Court erred in deciding, that the defendant corporation was required to give the deceased, or any of its members thirty days notice of the falling due of an assessment or mortuary call.

IV.

The said Court erred, in not applying the laws of the State of New York, chapter 175, laws of 1883, to the defendant corporation, and in not holding that the said defendant corporation was subject only to the provisions of the said laws.

V.

The said Court erred in not applying the decision of the New York Court of Appeals, in the case of Ronald v.

Mutual Reserve Fund Life Association, 132 N. Y. 378, to the defendant corporation, and in not holding that the defendant corporation was subject only to the provisions of the laws of the State of New York, chapter 175, laws of 1883.

VI.

The said Court erred, in deciding that the notice of the assessment, or mortuary call No. 68, dated and mailed by the defendant corporation on June 1st, 1893, and calling for the payment by the said deceased of the said assessment or mortuary call on or before July 1st, 1893, was not given or served as required by the said laws of the State of New York, of 1876, as amended in 1877, if the said laws did apply to the defendant corporation.

VII.

That the said Court erred, in not construing the policy of insurance in this case, according to the laws of the State of New York applicable thereto.

VIII.

The said Court erred, in deciding that the said notice of assessment or mortuary call No. 68, dated and mailed to the said deceased, by the defendant corporation on June 1st, 1893, was not duly given or served.

IX.

That the said Court erred, in deciding that the assessment or mortuary call No. 68, dated and mailed by the corporation defendant on June 1st, 1893, was due July 1st, 1893.

X.

The said Court erred in deciding, that the failure by the said deceased to pay the assessment or mortuary call No. 68, did not operate as a forfeiture of the policy of insurance in this case, and that notwithstanding such failure and default, that said policy of insurance remained in full force and effect.

XI.

The said Court erred, in ordering judgment for the plaintiff.

XII.

The said Court erred, in not ordering judgment for the defendant. And the plaintiff in error, Mutual Reserve Fund Life Association, prays that said judgment be reversed, annulled and altogether held for naught, and that it may be restored to all things which it has lost by occasion of such judgment, and that a new trial be granted.

HAWLEY & PUCKETT,
Attorneys for Plaintiff in Error.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

[Endorsed]: No. 127. In the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit. J. K. Dubois, as Administrator, etc., Defendant in Error, vs. Mutual Reserve Fund Life Association, Plaintiff in Error. Assignment of Errors. Filed June 21st, 1897. A. L. Richardson, Clerk.

Hawley and Puckett, attorneys for plaintiff in error; I. B. L. Brandt, of counsel.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central Division of the State of Idaho.

J. K. DUBOIS, as Administrator of the Estate of Edward Jay Curtis, Deceased,

Plaintiff,

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Defendant.

Order Fixing Amount of Bond, etc.

The defendant, the Mutual Reserve Fund Life Association, having this day filed its petition for a writ of error from the decision and judgment thereon made and entered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an as-

signment of errors within due time, and also praying that an order be made fixing the amount of security which defendant should give and furnish upon said writ of error, and that upon the giving of said security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, and said petition having this day been duly allowed:

Now, therefore, it is ordered, that upon the said defendant, the Mutual Reserve Fund Life Association, filing with the Clerk of this Court a good and sufficient bond in the sum of six thousand five hundred seventy and 70-100 dollars, ($6,570.70), to the effect, that if the said defendant the Mutual Reserve Fund Life Association, and plaintiff in error shall prosecute the said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void; else to remain in full force and virtue, the said bond to be approved by the Court, that all further proceedings in this Court be, and they are hereby suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated, June 21st, 1897.

JAS. H. BEATTY,
Judge.

[Endorsed]: No. 127. In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Central

Division of the State of Idaho. J. K. Dubois, as Administrator, etc., Plaintiff, vs. Mutual Reserve Fund Life Association, Defendant. Order of Court fixing amount of Bond, and suspending and staying proceedings. Filed June 21st, 1897. A. L. Richardson, Clerk.

Hawley and Puckett, attorneys for defendant. I. B. L. Brandt, of counsel.

Bond on Appeal (See Designation).

[A Supersedeas Bond in the sum of $6,570.70, as required and ordered to be given and furnished by the defendant upon said writ or error, was on the 21st day of June, 1897, duly and regularly given, furnished, and filed with the clerk of the court, pursuant to and in compliance with the said order; that by written stipulation and agreement indorsed thereon, the attorney for plaintiff and defendant in error, accepted the said bond, and waived all objection thereto, as to its form and sufficiency; that thereupon, the said bond was duly approved by the Judge of the Court as to form and also as to sufficiency of surety.]

UNITED STATES OF AMERICA—ss.

Citation.

The President of the United States, to J. K. Du Bois, as Administrator of the Estate of Edward Jay Curtis, Deceased, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, on the 20th day of July, 1897, pursuant to a writ of error duly issued and now on file in the clerk's office of the Circuit Court of the United States, for the Ninth Circuit, Central Division of the State of Idaho, wherein the Mutual Reserve Fund Life Association, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JAMES H. BEATTY, Judge of the United States Circuit Court for the Ninth Circuit, Central Division of the State of Idaho, this 21st day of June, A. D. 1897.

JAS. H. BEATTY,

Judge.

[Endorsed]:

Service of the within Citation and receipt of a copy thereof is hereby admitted this 21st day of June, 1897.

ALFRED A. FRASER,

Attorneys for Defendant in Error.

[Endorsed]: Filed June 21, 1897. A. L. Richardson, Clerk.

UNITED STATES OF AMERICA—ss.

Writ of Error.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Central Division of the State of Idaho, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Mutual Reserve Fund Life Association, a corporation, defendant, and plaintiff in error, and J. K. DuBois, as administrator of the estate of Edward Jay Curtis, deceased, plaintiff, and defendant in error, a manifest error hath happened, to the great damage of the said Mutual Reserve Fund Life Association, a corporation, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the

parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 20th day of July next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 21st day of June, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal] A. L. RICHARDSON,
Clerk of the Circuit Court of the United States, for the Ninth Circuit, Central Division of the State of Idaho.

Allowed by

JAS. H. BEATTY.
Judge.

Service of the within writ and receipt of copy thereof is hereby admitted this 21st day of June, 1897.

[Seal] ALFRED A. FRASER,
Attorney for Plaintiff and Defendant in Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of Idaho.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] A. L .RICHARDSON,
Clerk.

[Endorsed]: No. 127. Circuit Court of the United States, Ninth Circuit, Central Division of the State of Idaho. Mutual Reserve Fund Life Ass'n, a corporation, Plaintiff in Error, vs. J. K. DuBois, as Administrator, etc., Defendant in Error. Writ of Error. Filed June 21, 1897. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the Ninth Judicial Circuit, and District of Idaho.

J. K. DUBOIS, as Administrator of the Estate of Edward Jay Curtis, deceased,

vs.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Clerk's Certificate to Transcript.

I, A. L. Richardson, Clerk of the Circuit Court of the United States ,in and for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 121, inclusive to be a full, true and correct copy of the pleadings and proceedings in the above entitled cause and that the same together constitute the return to the annexed writ of error.

I further certify that the cost of said record amounts to $116 50-100 which has been paid by the said Plaintiff in Error.

Witness my hand and the seal of said Circuit Court affixed at Boise City, Idaho, this 12th day of July, 1897.

A. L. RICHARDSON,

Clerk.

[Endorsed]: No. 392. United States Circuit Court of Appeals, for the Ninth Circuit. Mutual Reserve Fund Life Association, a Corporation, Plaintiff in Error, v. J. K. Du Bois, as Administrator of the Estate of Edward J. Curtis, deceased, Defendant in Error. Transcript of Record. Writ of Error to the Circuit Court of the United States, for the District of Idaho, Central Division.

Filed Aug. 3, 1897.

F. D. MONCKTON,

Clerk.

No. 392

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Plaintiff in Error,

vs.

. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, Deceased.

Defendant in Error.

Brief of Plaintiff in Error.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCIATION, a Corporation,
Plaintiff in Error,
vs.
J. K. DU BOIS, as Administrator of the Estate of Edward Jay Curtis, Deceased,
Defendant in Error.

Brief of Plaintiff in Error.

The object of the writ of error in this case is to reverse a judgment of the court below in favor of the plaintiff in the action against the defendant therein, the Mutual Reserve Fund Life Association, for the amount of a policy of life insurance issued by the company upon the life of Edward J. Curtis.

STATEMENT OF THE CASE.

The Mutual Reserve Fund LifeAssociation is a corporation organized and existing under and by virtue of Chapter 267 of the Laws of 1875, and of Chapter 175 of the Laws of 1883, of the State of New York and of various

acts amendatory thereof and supplemental thereto; and is a mutual benefit association, engaged in the business of insuring the lives of its members upon the co-operative or assessment plan and subject only to the provisions of said laws. [Transcript, pp. 27-28, 41, 51, 55.]

The policy of insurance issued upon the life of deceased was issued upon the "condition of the payment of all mortuary premiums, payable at the home office of the association in the City of New York *within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year* during the continuance of this certificate or policy of insurance, and subject to all the provisions, requirements and benefits stated on the second page of this certificate or policy of insurance, which are hereby referred to and made a part of this contract." [Trans., p. 15.]

Among the provisions and requirements stated on the second page of the certificate are the following: "Within thirty days from the first week day of the months of February, April, June, August, October and December of each year during the continuance of this certificate or policy of insurance, there shall be payable to the association a mortuary premium, for *such an amount as the executive committee of the association may deem requisite*, which amount shall be at such rates, according to the age of each member, as may be established by the board of directors." [Trans., pp. 16-17.]

"A notice of a mortuary premium or other notice ad-

dressed to a member, or other person, at the postoffice address appearing upon the books of the association, shall be deemed a sufficient notice, and affidavit of, or proof of addressing and mailing the same according to the usual course of business of said association, shall be taken and admitted as evidence, and shall be, constitute, and be deemed and held to be, conclusive proof of due notice to said members, and every person accepting or acquiring any interest thereunder.

In the event of the non-receipt by a member of a mortuary premium notice on or before the first week day of February, April, June, August, October and December of each and every year, *it shall be nevertheless a condition precedent to the continuance of this certificate or policy of insurance in force, that an amount equal at least to the amount of the next preceding mortuary premium paid shall be paid said association within thirty days from the first week day of February, April, June, August, October and December of each and every year. Notice that a mortuary premium is payable to said association on the first week day of February, April, June, August, October and December of each and every year is hereby given and accepted, and any further or other notice is hereby waived.*" [Trans., pp. 20-21.]

"This certificate or policy of insurance is also issued and accepted subject to the express condition that *if any of the payments stipulated in this contract shall not be paid on or before the day of the date* as provided in this contract at the home office of the association in the city of New York, or to a duly authorized collector of the asso-

ciation upon a receipt signed by its president, secretary or treasurer. . . . . Then, and in each and every such case, *the consideration of this contract shall be deemed to have failed, and this certificate or policy of insurance shall be null and void.*" [Trans., p. 25.]

"This contract on the part of the association is a *bi-monthly term contract renewable* at the option of the member before expiration, *upon payment of the dues and mortuary premiums at the times and in the manner in this contract provided.*" [Trans., p. 24.]

"This contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the city of New York." [Trans., p. 24.]

The constitution and by-laws, which are referred to in the certificate or policy of insurance, and made part thereof, provide: "On the first week day of the months of February, April, June, August, October and December of each year (or at such other dates as the board of directors may from time to time determine) *an assessment shall be made* upon the entire membership in force at the date of the last death of the audited death claims prior thereto, *for such a sum as the executive committee may deem sufficient to meet the existing claims by death, the same to be apportioned among the members, according to the age of each member.*" [Trans., p. 43.]

"A failure to pay the assessment *within thirty days from the first week day* of February, April, June, August,

October and December (or within thirty days from the day of the date of such periods as may be named by the directors) *shall forfeit his membership* in this association, with all rights thereunder, *and the certificate of membership shall be null and void.*" [Trans., p. 43.]

"If any of the conditions or provisions of the certificate of membership or of the constitution or by-laws are violated by the member, then, and in every such case, such membership shall at once cease and determine, and the certificate shall be null and void, and all payments made thereon forfeited to the association." [Trans., p. 43.]

"But the executive committee shall have power to reinstate a delinquent member at any time within one year, for good cause shown, and upon satisfactory evidence of good health, and upon payment of all delinquent dues and assessments." [Trans., p. 44.]

The case was tried before the court without a jury upon a stipulation of counsel as to certain facts, and an affidavit of B. W. T. Amsden, the cashier and former assistant secretary of plaintiff in error, from which the following facts appear.

On June 1st, 1893, a notice of an assessment or mortuary call numbered 68 was duly deposited in the general postoffice at New York city at 5 p. m., addressed to the insured at the last address of the insured upon the books of the association. [Trans., p. 51.]

The said call was one of the bi-monthly payments or assessments provided to be made by the policy, to-wit,

the payment or assessment required thereby to be paid within thirty days from the first week day of June and was for $33.96. [Trans., p. 51.]

The notice thus sent the insured was dated June 1st, 1893, called for the payment of the amount of said call No. 68, to-wit, $33.96, and informed the insured as follows:

"Please take notice that an assessment or mortuary call is hereby made upon you pursuant to the order of the executive committee of the association for the above amount *to be paid within thirty days from the date of this notice*, in accordance with the conditions of this certificate or policy and the constitution and by-laws of the association. *The above payment must be made on or before July 1, 1893*, at the home office of the association in the city of New York, or to its duly authorized local treasurer, whose name is stamped upon this notice, and who is furnished with a receipt signed by the treasurer of the association. If the same is not paid within the time stated, the policy and all payments thereon will become forfeited and void, and your membership with the association will expire with all rights thereunder. *Notice is hereby given that the further regular stated assessments or mortuary calls, each for at least an amount equal to the amount of this assessment or mortuary call, are hereby made upon you*, which will be due and payable, the first within thirty days from the first day of August, 1893, and the other within thirty days from the second day of October, 1893, the causes and purposes of this and

of each of said further regular stated assessments or mortuary calls, being as provided in article V, section 1 of the constitution. . . . You are respectfully urged to remit the amount at once and not wait until the expiration of the time, thereby avoiding the expiry of your insurance. *The above mortuary call is NOW due and payable, and should be PAID AT ONCE.* If not paid *on or before July 1, 1893,* the policy will expire, and become null and void." [Trans., p. 55.]

The said call No. 68 was not paid or tendered by the insured on or before July 1, 1893, and, in fact, has never been paid or tendered. Other assessments,mortuary calls and premiums subsequently became due and payable by members of the association, but none of such assessments, calls or premiums were ever paid or tendered by the insured or on his behalf, nor was such non-payment ever condoned or acquiesced in by the association. [Trans., p. 48.]

No other or further notice of assessments or mortuary calls was ever sent the insured subsequent to the notice above mentioned, nor was the insured ever re-instated or recognized as a member of the association; but a notice that his certificate had lapsed and stating the conditions upon which he might be reinstated, together with a blank form of application for reinstatement was sent him on July 18, 1893, according to the usual course of business of the association. [Trans., p. 53.]

The insured died December 29th, 1895, and the suit was

brought by the defendant in error as administrator of his estate. In its decision the court held that the plaintiff in error and the certificate in question were subject to and governed by the laws of the State of New York, that the certificate was subject to and to be construed according to an act of said State of May 23rd, 1877, that notice of call No. 68 had not been given as required by said act, and that, therefore, the insured was not in default at the time of his death. Judgment was accordingly rendered in favor of plaintiff for the full amount of the policy. [Trans., p. 67.]

The opinion of the court concludes as follows:

"In this case the assured was entitled to at least thirty days' notice prior to the day of payment. The notice was served at 5 P. M. June 1st; to 5 P. M. July 1st would be thirty days, but there can be no hesitation in holding that no part of June 1st can be included as a part of the thirty days' notice. They cannot commence until after 12 P. M., June 1st, and cannot end until after 12 P. M., July 1st, or until the beginning of July 2nd. It is therefore held that the notice was not served in time; that failure to pay the premium did not operate the forfeiture of the policy, and judgment for plaintiff is ordered." [Trans., pp. 72-73.]

SPECIFICATIONS OF ERRORS RELIED UPON.

1. The act of Legislature of New York of 1876, as amended in 1877, does not apply to the plaintiff in error which is subject solely to the provisions of an act of 1883. Such is the decision of the highest court of the State of New York, and such decision is conclusive upon this court.

2. The act of 1876, as amended in 1877, has no application to insurance companies, which, like the plaintiff in error, operate upon the assessment plan.

3. Even if the act of 1876, as amended in 1877, was applicable to the plaintiff in error, still the notice given of the levying of the assessment complied with that act, and was sufficient.

4. Under the terms of the certificate or policy no notice of call No. 68 was required to be given the insured.

5. Under the terms of the certificate or policy it was clearly the duty of the insured to pay the plaintiff in error, on or before July 1st, 1893, at least an amount equal to the last previous assessment, and the failure to pay at least such amount within said time caused the termination of the certificate and of all of the insured's rights thereunder.

ARGUMENT.

There can be no doubt that the non-payment of assessment or mortuary call No. 68 within the time required for its payment, if notice thereof was properly given, or if notice thereof was not required, terminated the policy or certificate of insurance, and the deceased thereupon ceased to be a member of the plaintiff in error association.

Niblack on Benefit Societies (2d ed) sec. 289.

Pendleton vs. *Knickerbocker Life Ins. Co.*, 5 Fed. Rep. 240.

Madera vs. *Merchants' Exchange Mutual Benefit Soc.*, 16 *Id.* 749.

Rood vs. *Railway P. & F. C. Mut. Ben. Assn.*, 31 *Id.* 62.

Lantz vs. *Insurance Co.*, 139 Pa. 560, 561.

Bosworth vs. *Western Mut. Aid Soc.*, 75 Iowa, 583.

Yoe vs. *Howard Mut. Ben. Assn.*, 63 Md. 86.

The certificate of insurance providing that "this contract shall be governed by, subject to, and construed only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said association in the City of New York," the rights of the parties under the contract must be determined, as was held by the court below, by the laws of that State.

Washington Central Bank vs. *Hume*, 128 U. S. 195, 206, 207.

Phinney vs. *Mutual Life Ins. Co. of New York*, 67 Fed. Rep. 493.

The decisions of the Court of Appeals of the State of New York, construing the various statutes of that State relating to insurance companies and associations, enter into and form parts of those statutes, and are binding and conclusive upon the courts of the United States.

Morley vs. *Lake Shore Railway Co.*, 146 U. S. 162, 166, 167.

McElvaine vs. *Brush*, 142 *Id.* 155, 160.

Louisiana vs. *Pillsbury*, 105 *Id.* 278, 294.

Fairfield vs. *County of Gallatin*, 100 *Id.* 47, 52.

Walker vs. *State Harbor Commissioners*, 17 Wall. 648, 651.

County of Leavenworth vs. *Barnes*, 94 U. S. 70, 71.

Stone vs. *Wisconsin, Id.*, 181.

And the courts of the United States take judicial notice of such decisions.

Fourth National Bank vs. *Francklyn*, 120 U. S. 747, 751.

Lamar vs. *Micon*, 114 *Id.* 218, 223.

I.

The Act of 1876, as amended in 1877, does not apply to the plaintiff in error, which is subject solely to the provisions of an act of 1883. Such is the decision of the highest

court of New York, and such decision is conclusive upon this court.

By an act of the Legislature of New York of 1883, as amended in 1887, sec. 5, it is provided: "Any corporation, association or society which issues any certificate, policy or other evidence of interest to, or makes any promise or agreement with its members, whereby upon the decease of a member any money or other benefit, charity, relief or aid is to be paid, provided or rendered by such corporation, association or society to the legal representatives of such member, or to the beneficiary designated by such member, which money, benefit, charity, relief or aid are derived from voluntary donations, or *from admission fees, dues and assessments or any of them* collected or to be collected from the members thereof, or members of a class therein, and interest and accretions thereon, or rebates from amounts payable to beneficiaries or heirs; and wherein the paying, providing or rendering of such money or other benefit, charity, relief or aid, is conditioned upon the same being realized in the manner aforesaid, and wherein the money, or other benefit, charity, relief or aid so realized is applied to the uses and purposes of such corporation, association or society, and the expenses of the management and prosecution of its business, shall be deemed to be engaged in the business of life insurance upon the co-operative or assessment plan, and *shall be subject only to the provisions of this act.*

3 Revised Statutes of New York, (8th ed) pp. 1703-10.

The only provision in the act last mentioned for notice to a member of the levying of an assessment is paragraph 17 of the act: "Each notice of an assessment made by any corporation, association or society transacting the business of life or casualty insurance, or both, upon the co-operative or assessment plan, made upon its members, or any of them, shall truly state the cause and purpose of such assessment, and shall also state the amount paid on the last death claim paid, the name of the deceased member, and the maximum face value of the certificate, or policy, and, if not paid in full, the reason therefor."

The defendant is a corporation organized under the laws of the State of New York for the purpose of insuring the lives of its members, and the certificate issued by it to the deceased provides for the payment by defendant of a sum of money derived from admission fees, dues and assessments to be collected from the members, and is therefore to be "deemed to be engaged in the business of life insurance upon the co-operative or assessment plan, and shall be subject *only* to the provisions of this act."

The notice of the assessment mailed to deceased fully complies with all the requirements of this act.

It is provided in the policy that, "all notices addressed to a member, or other person designated by said member, at the last postoffice address appearing upon the books of the association, shall be deemed a sufficient notice, and affidavit of addressing and mailing the same, according to the usual course of business of said associa

tion, shall be held to be conclusive proof of due notice to every person acquiring any interest hereunder."

The evidence in this case shows the mailing of notice of the assessment to the deceased at his last postoffice address appearing upon the books of the defendant.

In *Ronald* vs. *Mutual Reserve Fund Life Association*, the plaintiff in error here, 132 N. Y. 385, it was said: "The plaintiff now raises the point, not presented at the trial, that the defendant could not forfeit Ronald's policy because no notice of the annual dues had been given him in advance of the date when the same became due pursuant to ch. 341, laws 1876, amended by ch. 321, laws 1877. The defendant is a mutual benefit association doing business upon the co-operative assessment plan. It was originally incorporated under ch. 267, laws of 1875, and reincorporated December 26, 1883, under ch. 175, laws 1883. Companies organized under the last mentioned act, and doing business upon the plan therein described, characterized as the co-operative or assessment plan, are by section 5 declared to be subject only to the provisions of that act; thus it would seem that they are not subject to the provisions of the act requiring previous notice of the due date of annual dues."

II.

The act of 1876, as amended in 1877, has no application to insurance companies, which, like the plaintiff in error, operate upon the assessment plan.

It is provided in the certificate of insurance, as one of the conditions thereof, that, "within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year, during the continuance of this certificate or policy of insurance there shall be payable to the association a mortuary premium for *such an amount as the executive committee of the association may deem requisite*, which amount shall be at such rates, according to the age of each member, as may be established by the board of directors."

It will thus be seen that the amount a member of the association might be called upon to pay at any time as a mortuary premium was uncertain—such an amount as the executive committee might in its judgment assess.

The amount to be paid at any time on account of premiums being thus uncertain, the act of 1876, as amended in 1877, was inapplicable, for that act has reference only to insurance companies whose policies provide for the payment at regular periods of certain and fixed amounts, and does not apply to companies doing business, like the plaintiff in error, upon the assessment method.

In *Merriman* vs. *Keystone Mutual Benefit Association*, 138 N. Y. 116, 122-3, the act of 1876, as amended in 1877, was construed by the court of appeals, and declared not to apply to insurance associations of the character of the plaintiff in error, the court saying: "But the defendant claims some advantage from the act, chapter 321 of the laws of 1877, which provides," etc: "The defendant claims that this act is applicable to this policy, and that the notice served by it was sufficient under the act to authorize it, upon non-compliance therewith by Merriman, to declare the policy forfeited. We do not think that the act is applicable to such a situation as this. It clearly has reference only to policies where premiums or interest become payable at stated times, and the purpose of the act is to require the insurers to give the notice so that the policy holders may not lose the benefit of the policy by forgetfulness or misapprehension as to the time of the stated payments. The mortality payments required to be made under this policy are uncertain in amount and time of payment, and by the terms of the policy they can only become due after notice and demand, and hence they are not within the purpose of the act. These mortality assessments are in no proper sense premium or interest payments."

That the policy in this case is not one where premiums or interest became payable at stated times, and where the amount required to be paid was certain, is very clearly declared in a case in which a similar policy of the plaintiff in error was construed.

In *Mutual Reserve Fund Life Association* vs. *Hamlin*, 139 U. S. 297, 302-303, it was said: "It is true insured was informed by the defendants' constitution, as amended July 11, 1883, subject to which the contract of insurance was executed, that assessments would regularly be made in February, April, June, August, October and December, or at such other periods as the directors might determine. But if the association was bound to make assessments in those months, whether made necessary or not by its financial condition, still the insured could not know in advance the amount of an assessment, for such amount depended upon the state of the death fund, the determination of the executive committee as to the sum required to meet the existing claims by death, and the apportionment of that sum among members according to their respective ages and the rates specified in the certificates of membership. Now, it is contended that the failure of the insured in this case to inform the defendant in writing that he had not received notice of the assessment of June 2, 1884, was alone sufficient to forfeit his membership. This suggestion necessarily proceeds upon the ground that the association had no discretion but to make an assessment on that day and that the insured must be held to have known that one was made, although he could not have knowledge of its amount. This construction of the defendant's constitution and by-laws may well be doubted. We incline to the opinion that the association was not required to make an assessment except when the condition of the "death fund" made it necessary to raise money to meet existing claims by death. The contract—adopting almost

literally the words of the constitution—required an assessment 'whenever the death fund of the association is insufficient to meet the existing claims by death,' and 'for such sums as the executive committee may deem sufficient to cover said claims.' This would indicate that an assessment should not or would not be made unless rendered necessary by the condition of the death fund."

III.

Even if the act of 1876 as amended in 1877 was applicable to the plaintiff in error, still the notice given of the levying of the assessment complied with that law and was sufficient.

The opinion of the circuit court in this case treats assessment No. 68 as becoming due and payable July 1st, 1893, and the notice of the assessment as a notice given prior to the due date of the assessment.

The notice was mailed June 1st, 1893. If we count the day of mailing, there was clearly thirty days' notice; if we exclude that day, and include the day of payment, July 1st, there was also thirty days' notice. If, however, we exclude from our computation both the day of mailing and the day of payment, then there was only twenty-nine days' notice. The court below excluded both those days, and accordingly held the notice insufficient.

The language of the act of 1876, as amended in 1877, relied upon by the Circuit Court, is as follows, "provided, however, that a notice stating when the premium will fall due, and that, if not paid, the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, *at least thirty*, and not more than *sixty days prior to the time when the premium is payable*, shall have the same effect as the service of the notice hereinbefore provided for." The opinion of the circuit court in this case holding that but twenty-nine days' notice was given of assessment No. 68 is not based upon any decisions of the courts of New York, by which decisions alone the liability of the defendant is to be determined, but rests upon two decisions of the courts of the United States, to-wit, *Sheets* vs. *Selden*, 2 Wallace, 190, and *Hicks* v. *National Insurance Co.*, 60 Federal Reporter, 692.

In the case from 2 Wallace, leases provided that rents should be paid semi-annually on the first days of May and November, and that, if any installment should remain unpaid for one month *from* the time it should become due, all the rights and privileges secured to the lessees should cease, and it was held that the one month from the 1st day of May within which the payment of the rent due on that day was to be made, expired on the 1st day of June following, the Court declaring that where time is to be computed *from* a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, the general

rule is to exclude the day thus named, and to include the last day of the specified period. As the word "from" in the leases in that case, and also as considered by the Court, was obviously used in the sense of after or exclusive of the first day of May, the Court, in laying down the rule in question was simply giving effect to the evident intention of the parties. But in this case the statute construed does not provide, at least that part of it considered by the Court, for the doing of any act by the plaintiff in error within a specified period *from* or *after* a day named, but simply requires notice to be mailed thirty days prior to the time when the assessment is payable, a provision, as we shall see hereafter, of an entirely different character from that construed in 2 Wallace.

In the case in 60 Federal Reporter, an insurance company in New York mailed notice of the falling due on December 2 of a premium, on November 2nd previous, and it was held that the notice was not mailed thirty days prior to the time when the premium became due. In its opinion the court in that case say: "It has always been the rule in New York in applying statutes in which a computation of time is to be made from the day on which an act is to be done to exclude the day. Thus in Small vs. Edrick, 5 Wendell, 137, the statute was that a notice should be served 'at least fourteen days before the first day of the court,' and the notice was served on the 9th day of November, the 23d day of the same month being the first day of the court, and it was held that this was a notice of only 13 days. 'When the period allowed for do-

ing an act, says Mr. Chief Justice Bronson, 'is to be reckoned from the making of the contract or the happening of any other event, the day on which the event happened may be regarded as an entirety or as a point of time, and so be excluded from the computation. *Cornell* vs. *Moulton*, 3 Denio, 16. The principle of computation is thus expressed in *Sheets* vs. *Selden's Lessee*, 2 Wall. 177: 'The general current of the modern authorities upon the interpretation of contracts and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated, and to include the last day of the specified period.'" It will thus be seen that in the 60th Federal Reporter case the court fails to observe any distinction between a provision for the doing of an act within a particular time from or after a day named and a provision for the giving of a notice a certain number of days before a particular event, and that its decision depends mainly on the case from 5th Wendell.

An examination of the authorities, however, and especially those of New York, by which this case must be controlled, will show that the decision in this case and that in 60 Federal Reporter, upon which this was decided, are erroneous and cannot be upheld.

In *Columbia Turnpike Road* vs. *Haywood*, 10 Wendell, 424, it was held that a summons returnable at ten A. M. of April 8, and which was served in the afternoon of April 2, was properly served under a statute which required

service thereof to be made at least six days before the time of appearance.

Court: "In the service of process or of notices or pleadings in a cause, fractions of a day are not regarded. The service of the summons in this case, for the purpose of a day in computation of time, was as equally well served in the afternoon as in the morning. Our rule is well settled that, when days are mentioned in the statutes or our own rules they are to be reckoned, one exclusive and one inclusive. Thus a notice of argument is a notice of eight days. If the term commences on the ninth day of the month, the service must be on the first. If you include in the computation the day of service, you will have eight days, excluding the first day of term; if you exclude the day of service, you include the first day of term. So when six days' service of a summons are required, and it is returnable on the eighth, the service on the second is good."

Referring to the case in 5th Wendell, the opinion says: "This rule of construction is said by the defendant's counsel to be inconsistent with the decision in *Small* vs. *Edrick*, 5 Wendell, 137, but it will be seen that the phraseology of the two statutes under which the questions arise is different; the one requires the summons to be served at least six days before the time of appearance; the other requires notice to be served at least fourteen days before the first day of the court. The latter excludes the first day of the court, and therefore requires fourteen days, one exclusive and one inclusive, excluding the first day of court which our rules and the general rules of construc-

tion include. That case is, therefore, an exception to the general rule, and is so from the terms of the statute."

See, also, *Bunce* vs. *Reed*, 16 Barb. 347, 349.

In ***Dayton*** vs. *McIntyre*, 5 How. Pr. 117, notice of trial for October 21st, served on October 11th, was held good under a provision that notice of trial must be given "at least ten days before the court."

And in *Easton* vs. *Chamberlain*, 3 How. Pr. 411, under the same provision, notice of trial for February 19th, served on February 9th at 8 P. M. was held sufficient.

In *Gillespie* vs. *White*, 16 Johns. 117, 120, a law requiring that a writ to charge bail should lie in the office of the sheriff four days, exclusive of the return day thereof, was held complied with where the writ was left with the sheriff September 15th and returned by him September 19th.

In *Vandenburgh* vs. *Rensselaer*, 6 Paige's Ch. 147, it was said: "Where, by the rules or practice of the court, any subsequent proceeding in a cause is required to be had within a limited time, or within a certain number of days from or after any previous proceeding, as from the entry of an order or the service of a notice or other paper in the cause, the whole of the day on which the order is entered or the notice or other paper was served, is to be excluded in the computation of time, so as to give the full time after that day. But where previous notice of a motion, or of any other proceeding in the suit is required to be given,

the whole of the day on which the notice was to be served, is to be included in the computation of time, and the day upon which the motion is to be made, or other proceeding had, is excluded."

In *Stebbins* vs. *Anthony*, 5 Colo. 348, 353-360, publication of a summons was required to be made "for four successive weeks, the first of which shall be at least thirty days before the return day of such summons." The first publication of the summons was made May 2, 1874, and the return day of the summons was June 1st. Held that the first day of such publication was thirty days before the return.

At page 360 the court declare the general rule to be that where a statute requires an act to be performed a certain number of days prior to a day named, or within a definite period after a day or event specified; or where time is to be computed either prior to a day named or subsequent to a day named, the usual rule of computation is to exclude one day of the designated period, and to include the other." And at page 357 the opinion says: "It is contended on behalf of plaintiff in error that our statute must be construed to give thirty clear days between the day of the first publication and the return day of the writ, because the requirement is, that the first publication shall be at least thirty days before the return day of the summons. In support of this position, among other cases, we are cited to the case of *Small* vs. *Edrick*, 5 Wendell, 138. This case construed a statutory provision respect-

ing a notice of trial, which was, that written notice of trial of every issue shall in all cases be served at least fourteen days before the first day of the court at which such trial is intended to be had. The court refer to and admit the general rule of law that in the computation of time relating to the service of papers, one day is inclusive and the other exclusive, and say such has been their ruling; but that in this instance a rule of court excludes the day of service, and the statute excludes the first day of court, so that both days must be excluded."

In *Northrop* vs. *Cooper*, 23 Kans. 432, a statute required publication of notice of sale "for at least thirty days before the day of sale," and it was held that a publication commenced October 13th of a sale to occur November 12th, complied with the statute.

To the same effect as the last case is *Hagerman* vs. *Ohio B. & S. Association*, 25 Ohio St. 186, 207.

In *Misch* vs. *Mayhew*, 51 Cal. 514, the law provided that in an election contest a list of the illegal votes alleged to have been cast should be delivered to the opposite party "at least three days before such trial." The trial occurred on December 10th, and a list of alleged illegal votes was served on the opposite party on December 7th, and it was held the list was served in time.

In *Hagenmeyer* vs. *Mendocino Co.*, 82 Cal. 214, it was held that notice mailed on the 11th of July, requiring a

party to appear and show cause on the 18th of July why his assessment should not be raised was a seven days' notice.

In *Landregan* vs. *Peppin*, 86 Cal. 126-7, it was declared that notice to redeem August 23, served July 25th was a twenty-nine days' notice.

In *Bates* vs. *Howard*, 105 Cal. 173, 181-2, the statute required notice of an application for letters of administration to be given by posting "at least ten days before the hearing," and it was held that a notice posted on July 12th for a hearing on July 22 was a ten days' notice.

In *Gray* vs. *Worth*, 129 Mo. 122, 130-1, notice of a sale was required to be given by advertising thirty days in a newspaper. The advertisement of the sale to take place on June 18, was first advertised May 19, and it was held that thirty days' notice had been given.

In *Hahn* vs. *Dierkes*, 37 Mo. 574, a law provided that a person desiring to file a mechanic's lien should give ten days' notice, prior to the filing of the lien to the owner of the property of his claim. Notice of a claim was given February 15th, and the lien was filed February 25th, and it was held that the notice was given ten days before the filing of the lien.

Court: "It [the statute] requires ten days' notice before the filing of the lien; but by the well-established rules of construction in such cases, where the first day is exclud-

ed, the last day is included; and we cannot see that the legislature intended to change this rule by the passage of the act in reference to liens."

In *Littleton* vs. *Christy's Admr.*, 11 Mo. 390, the law required three day's notice to be given of the taking of a deposition. Notice was given on the 19th for the taking of a deposition on the 22nd, and it was held that three days' notice had been given.

In *Garner* vs. *Johnson*, 22 Ala. 494, 500-1, a statute required a writ to be issued at least five days before the beginning of a term of court, and it was held that a writ issued on the 15th when the term of court commenced on the 20th was in time.

In *Brady* vs. *Moulton*, 61 Minn. 185, an act authorizing the issuance of bonds by a village provided that "not less than ten days' previous notice" of the special election should be given by publication in a newspaper. Held that notice first published May 16 was ten days' notice of election held on May 26th.

In *Coe* vs. *Caledonia & Mississippi Railway Co.*, 27 Minn. 197, under an act requiring notice of a meeting to be given by posting "at least ten days prior to such meeting," it was held that notices posted on May 13th of a meeting to be held on the 23d of the same month, were sufficient.

In *Arnold* vs. *Nye*, 23 Mich. 286, notice of the taking of a deposition was required to be served on the opposite party "at least ten days before the making of such application" and it was held that service on the 5th of the month of notice of an application to be made on the 15th was sufficient.

In *Eaton* vs. *Peck*, 26 Mich. 57, notice of an application for an order that a commission issue to take the deposition of a witness out of the state served on July 29th to be made on August 8th was held sufficient, under a statute requiring such notice to be served "at least ten days before the making of such application."

IV.

Under the terms of the certificate or policy no notice of call No. 68 was required to be given the insured.

The certificate, as we have seen, declares that: "Notice that a mortuary premium is payable to said association on the first week day of February, April, June, August, October and December of each and every year *is hereby given and accepted, and any further or other notice is hereby waived.*" And that it shall be a condition precedent to the continuance of the policy in force that an amount *equal at least to the amount of the next preceding mortuary premium paid* shall be paid said association within thirty days from the first week day of Feb-

ruary, April, June, August, October and December of each and every year."

The insured thus not only expressly waived notice of the falling due of an assessment, but was expressly informed of the amount that he would have to pay at each time for payment, in the event of not receiving notice, to-wit, "an amount equal at least to the amount of the next preceding mortuary premium paid," so that the absence of actual notice to him of the exact amount of an assessment could work no injury to him, and could not be complained of.

An insured, of course, has a legal right to waive notice of the falling due of a premium, and cannot complain of the want of notice, when such waiver has been made.

The mere fact, therefore, if such were the fact, that the notice of June 1st did not comply with the provisions of the act of 1877, assuming that the plaintiff in error was subject to such act, would not excuse the insured from paying the plaintiff in error within thirty days from the first week day of June "an amount equal at least to the amount of the next preceding mortuary premium paid;" and on the failure of the insured to make such payment the certificate or policy, according to its own terms, became "null and void."

It is respectfully submitted that the court below erred in its decision, and that the judgment should be reversed.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

No. 392.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Plaintiff in Error,

vs.

J. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, Deceased,

Defendant in Error.

Brief of Defendant in Error.

ALFRED A. FRASER,

Attorney for Defendant in Error.

BOISE, IDAHO.
SMITH PRINTING CO.
1897.

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Brief on Motion to Dismiss and Affirm.

The defendant in error, in support of his motion to ismiss the writ of error and affirm the judgment of the ircuit Court, assigns the following reasons therefor:

FIRST.

We claim that this is a proper motion and correct practice in this Court. We know of no case in this Court wherein this question has been passed upon, but we find that Rule 8 is as follows:– "The practice shall be the same as in the Supreme Court of the United States, as far as the same shall be applicable."

Subdivision 5 of Rule 6 of the Supreme Court of the United States is as follows:

"There may be united with a motion to dismiss, a writ of error or appeal, a motion to affirm, on the ground that, although the record may show that this Court has jurisdiction, it is manifest the appeal or writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

In the case of the City of Chanute vs. Trader, 132 Supreme Court Reports 67, Mr. Justice Blatchford, in the opinion of the Court, uses the following language:– "If the prosecution of writs of error to the execution of process to enforce judgments is permitted when no real ground exists therefor, such interference might become intolerable. This Court, in the exercise of its inherent power and duty to administer justice, ought, independently of subdivision 5 of rule 6, to reach the mischief by affirming the action below."

SECOND.

The Court should dismiss the writ of error because there is no proper or legal bill of exceptions filed in this action. The record shows that the judgment in this action was rendered at the December term, 1896, of the Circuit Court at Boise City, Idaho, and that the bill of exceeptions was not presented to or signed by the judge until April 13th, 1897; this was after the adjournment of the the term at which judgment was rendered, and the judge had no authority to sign it. Laws 1st. session, 53d. Congress, chapter 9, provides:– "Sec. 6. That the terms of the District Court for the District of the State of Idaho shall be held at Boise City, beginning on the first Monday in April and the first Monday in December."

Chapter 145, Laws 1892 provides:– "Sec. 2. That the Circuit Court of the United States in and for the State of Idaho shall be held at the times and places provided by law for the holding of the United States District Court in and for said district."

Therefore the bill of exceptions was improperly allowed and should be excluded from the record in this Court.

Missouri K. & T. Ry. Co. v Russell,
60 Fed. 501;

United States v Carr, 10 C. C. A. 80;

United States v Jones, 13 Sup. Ct. Rep. 840;

Miller v Ehlers, 91 U. S. 249;

Jones v Sewing Machine Co., 131 U. S., Append. 150;

Bank v Eldred, 143 U. S. 293;

Miller v Morgan, 14 C. C. A. 312.

By an inspection of said bill of exceptions the Court will find that it is not a proper one; it is nothing more than a transcript of the whole record of the proceedings in the lower court, containing all exhibits, depositions and other extraneous matters upon which no exception, objection or assignment of error is predicated;

Phosphate Co. v Cummer, 9 C. C. A. 279;

The Francis Wright, 105 U. S. 381;

Lincoln v Claflin, 7 Wall. 132;

City of Key West v Baer, 13 C. C. A. 572.

The said bill of exceptions is also a violation of Rule 10 of this Court.

FOURTH.

The record in this case shows that this writ of error was taken for delay and is absolutely without merit, and

therefore this motion should be granted and the judgment affirmed with damages as provided for in subdivision 2 of Rule 30 of this Court. The record shows that this action was tried by the Court without a jury, and the Court made a general finding in favor of the plaintiff in the Court below; there was no objection made to the admission or rejection of evidence, neither did the defendant ask an instruction in the nature of a demurrer to the evidence, that, on the proof offered, the plaintiff was not entitled to recover. Therefore there is nothing before this Court to review;

Pennywit v Eaton, 15 Wall. 382;

Martinton v Fairbanks, 112 U. S. 670;

Lehnen v Dickson, 148 U. S. 71;

Searcy County v Thompson, 13 C. C. A. 349;

O'Hara v Mobile & O. R. Co., 22 C. C. A. 512, citing many authorities;

Whitney v Cook, 99 U. S. 607.

This statement of the record brings us clearly within the law as declared in the following decisions, even if the Court overrules the motion as to the dismissal we are entitled to have the judgment affirmed;

Evans v Brown, 109 U. S. 180;

The S. C. Tryon, 105 U. S. 267;

Micas v Williams, 104 U. S. 556;

Swope v Leffingwell, 105 U. S. 3.

There is no assignment of errors in this case which can be considered by this Court. All the errors assigned are directed to the opinion of the Court or reasons for judgment contained therein and the law is well settled by repeated adjudicated cases of the United States Supreme Court and the several Circuit Courts of Appeal that error can not be predicated thereon;

British Queen Mining Co. v Baker Co., 139 U. S. 222;

Dickinson v Planters' Bank, 16 Wall. 250;

Lehnen v Dickson, 148 U. S. 71;

McFarlane v Golling et al., 22 C. C. A. 23;

Calverly v Deere, 15 C. C. A. 452;

Russell v Kern, 16 C. C. A. 154;

Adkins v W. & J. Sloane, 60 Fed. 344;

Same case on rehearing, 61 Fed. 791;

Bank of Commerce v First National Bank, 61 Fed. 809;

Kentucky Life & Accident Ins. Co. v Hamilton, 11 C, C. A. 42.

The opinion of the trial court is no part of the record;

England v Gebhardt, 112 U. S. 502.

Even if the Court could consider the opinion of the Court as a sufficient finding of fact within the statute as there was no objection made in the lower court to such findings, or to the judgment of the trial court based thereon and no request made in said court for a modification of said findings the point can not now be made for the first time in this Court;

Press v Davis et al., 54 Fed. 267.

The only objection made in the trial court was to the judgment and not to the findings if any there were. (See Transcript p. 76.)

For the reasons above stated, we contend that this motion should be sustained.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Plaintiff in Error,

vs.

J. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, Deceased,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

This was an action on a policy of insurance issued by the plaintiff in error on the life of E. J. Curtis, deceased and by agreement of parties the cause was tried by the court without a jury, and the evidence in said cause was presented to the trial court in the form of an agreed statement as to the testimony to be presented for its consideration.

The first paragraph of the statement of the case set forth in the brief of counsel for plaintiff in error in regard to the incorporation of the defendant company, is not a correct statement in this, he cites the Court to the allegations of the answer to sustain his contention, when the agreed statement of facts in regard to the incorporation of said company is as follows: "That the defendant now is, and at all times hereinafter mentioned was, a corporation, duly organized and existing under and by virtue of the laws of the state of New York, and engaged in the business of writing life insurance, and making contracts, insuring the lives of its patrons, in the state of New York and in the the state of Idaho." (Transcript page 45.)

This statement in regard to the incorporation of the company is binding on this Court.

First, because the parties to this action have agreed to it.

Second, because the matter set up in the answer as to the act under which they claim the company is organized is denied by the plaintiff and no proof of such fact was offered in the trial court.

Section 4217, Revised Statutes of Idaho, 1887 is as follows:—"The statement of any new matter in the

answer, in avoidance or constituting a defense or counter-claim, must, on the trial, be deemed controverted by the opposite party."

This action then involving questions of fact as well as of law was tried by the Court under the provisions of sections 649 and 700 of the Revised Statutes of the United States.

Section 649 is as follows:– "Issues of fact in civil cases in the Circuit Court may be tried and determined by the Court without the intervention of a jury whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the Court, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700:– "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the Court without the intervention of a jury, according to section six hundred and forty nine, the rulings of the Court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be revised by the Supreme Court upon writ of error or upon appeal, and, when the finding is special the review may extend to the determination of the sufficiency of the facts to support the judgment."

Section 1101:- "There shall be no reversal in the Supreme Court or in any Circuit Court upon writ of error * * * * for any error of fact."

The writ of error in this case must be governed by the provisions of the statutes above set forth.

And our contention is, that under the construction placed upon these statutes by the Supreme Court of the United States and the different Circuit Courts of Appeal, there is no question before this Court for review. In this case the Court made a general finding and gave judgment for the plaintiff. During the progress of the cause there was no objection made or exception taken to the admission or rejection of evidence nor were there any rulings of the Court during the progress of the trial excepted to by the appellant. There was no request for a ruling upon the legal sufficiency or effect of the whole evidence, and there was no motion in arrest of judgment. Upon this record the judgment must be affirmed.

In one of the earliest cases construing these statutes Mr. Justice Bradley in the opinion of the Court uses the following language: "But as the law stands if the jury is waived, and the Court chooses to find generally for one side or the other, the losing party has no redress, on

error, except for the wrongful admission or rejection of evidence."

Dirst v Morris, 14 Wall. 484, 491;

Insurance Co. v Folsom, 18 Wall. 237;

And in the case of Cooper v Omohundro, 19 Wall. 65, 69, Mr. Justice Clifford delivering the opinion of the Court says: in reference to the case of Insurance Co. v Folsom *supra*, "Our decision in that case was, that in a case where issues of fact are submitted to the Circuit Court, and the finding is general, nothing is open to review by the losing party, under a writ of error, except the rulings of the Court in the progress of the trial, and the phrase, 'rulings of the Court in the progress of the trial,' does not include the general finding of the Circuit Court nor the conclusions of the Circuit Court embodied in such general finding."

The rule laid down in the above cases has never been departed from in any Federal Court as far as counsel has been able to find from a thorough examination of the question.

In the case of Martinton v Fairbanks, 112 U. S. 670 a case tried by the Court without a jury, we find in the opinion of the Court the following:– "In the present case

the bill of exceptions presents no ruling of the Court made in the progress of the trial and there is no special finding of facts. The general finding is conclusive of fact against the plaintiff in error, and there is no question of law presented by the record of which we can take cognizance."

Again in Stanley v Supervisors of Albany, 121 U. S. 121, in the opinion of the court Mr. Justice Field says as follows:– "Where a case is tried by the court without a jury, its findings on questions of fact are conclusive here. It matters not how convincing the argument that upon the evidence the findings should have been different."

The following authorities are also directly in point on this question;

O'Hara v Mobile & O. R. Co., 22 C. C. A. 512;

Lehnen v Dickson, 148 U. S. 71;

Insurance Co. v Unsell, 144 U. S. 439;

On rehearing, Adkins v W. & J. Sloane, 10 C. C. A. 69;

Walker v Miller, 8 C. C. A. 331, citing nearly all the cases;

Distilling & Cattle Feeding Co. v Gottschalk Co., 13 C. C. A. 618;

Village of Alexandria v Stabler, 13 C. C. A. 616.

In the case of Searcy County v Thompson, 13 C. C. A. 349, the court construing the above statutes cites nearly all the cases on this question and in the opinion says:– "No exceptions were taken in the course of the trial, either to the admission or exclusion of testimony. Neither did the defendant ask an instruction in the nature of a demurrer to the evidence, that, on the proof offered the plaintiff was not entitled to recover. Such being the condition of the record, we are confronted at the outset with the inquiry whether the record presents any question which this court can review." And the court held there was not any. The record in the above case is identical with the one at bar.

The next question that presents itself for consideration, is, can the agreed statement of facts in this case be taken as the equivalent of a special finding of facts within the purview of the statute? This question has been answered in the negative in the case of Kentucky Life & Accident Insurance Co. v Hamilton, 11 C. C. A. 46 (on rehearing,) a case identical with the one at bar.

In the above case in the opinion of the court we find the following language: "But the so--called" agreed statement of facts does not purport to be a statement of the ultimate facts, but a mere agreement as to the evidence to be submitted to the court as bearing upon the issues presented by the pleadings. To treat the evidence thus submitted as an agreed statement of facts, equivalent to a

special finding of facts, would require this court on a writ of error, to examine the evidence as it was submitted to the court below, and confound all the distinctions which distinguish an appeal from a writ of error. The bill of exceptions sets out the numerous applications, notices, letters, policies, charters and by-laws therein referred to as having been read upon the hearing. What ultimate facts are proven by all this evidence is not stated in the agreement itself, nor is there any special finding of facts based upon all this evidence by the trial judge. An agreed statement of facts, which will be accepted as the equivalent of a special finding of facts, must relate to and submit the ultimate conclusions of fact, and an agreement setting out the evidence upon which the ultimate facts must be found, is not within the rule stated in Supervisors v Kennicott, *supra*.

In Raimond v Terribonne parish, 132 U. S. 192, a like question arose as to the sufficiency of a so-called agreed statement of facts, in regard to which the court said:– "The so-called statement of facts is mainly a recapitulation of evidence introduced by the parties at the trial."

See also,–

Minor v Tollotson, 2 How. 392,

Campbell v Boyreau, 21 How. 223,

Bond v Bustin, 112 U. S. 606.

Again in considering the assignments of error in this case I call the court's attention to the fact that assignments Nos. 1, 2, 3, 6, 8, 9 and 10. pages 2 to 5 inclusive, of Transcript are predicated upon the *opinion* of the trial court and can not be considered upon writ of error. In support of the above proposition I call the court's attention to the cases cited by counsel on page 25 of this brief.

All of the errors assigned by appellant, Nos. 1, 2, 3, 6, 8, 9 and 10 (if said errors can be considered) are based on the fact that the court applied the laws of the state of New York of 1876 as amended in 1877 to the defendant company. This question is now raised for the first time in this court by the appellant; in the trial court the appellant introduced evidence that the company had complied with the above laws, see the deposition of Bennett W. F. Amsden, page 50 of Transcript.

Appellant also now for the first time claims that they are not subject to the general insurance laws of New York, but only governed by Chapter 175 of the Laws of 1883 of New York.

Even if the above contention be true, it is now too late to raise the question in this court.

Where a party relies upon the provisions of a partic-

ular statute as a defense to a cause of action he must call the attention of the trial court to that statute;

City of Findlay v Pertz, 20 C. C. A. 662.

We contend that this policy is governed by the provisions of the laws of New York relating to the forfeiture of life insurance policies. Laws of New York 1877, Chapter 321, as follows:–

"No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium or interest, or any portion thereof, except as hereinafter provided. Whenever any premium or interest due upon any such policy shall remain unpaid when due, a written or printed notice stating the amount of such premium or interest due on such policy, the place where said premium or interest should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is assured, or to the assignee of the policy, if notice of the assignment has been given to the company, at his or her last known post-office address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premium. Such notice shall further state that unless the said premium or interest then due shall be paid to the company or to a

duly appointed agent or other person authorized to collect such premium, within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made within the thirty days limited therefor, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. Provided however, that a notice stating when the premium will fall due, and that if not paid the policy and all payments thereon will become forfeited and void, served in the manner hereinbefore provided, at least thirty and not more than sixty days prior to the day when the premium is payable, shall have the same effect as the service of the notice hereinbefore provided for."

If under the above statute there is a question as to whether or not its terms applied to this company, that doubt is entirely removed by Laws of New York 1885, Chapter 328, which is as follows:– Sec. 1, "Chapter 341 of the Laws of 1876 (amended by Act of 1877 above set forth,) entitled 'an Act regulating the forfeiture of Life Insurance policies' shall not apply to policies issued

upon monthly or weekly installments of premiums, provided the notices therein mentioned shall be waived in the application for such policies or in the additions to such applications."

This statute by naming the policies the above statute does not apply to, thereby, by implication of law and statutory construction it does apply to all others not excluded.

There is no contention here that this policy was issued on monthly or weekly installments of premiums, and if it was they do not claim that the notices required by the statute has been waived in the application for said policy.

In the case of Jacklin v National Life Ass'n., 24 N. Y. S. 746 the court held that the above statute applied to all life insurance companies except those excluded by the act of 1885 above set forth, and in that case the court refused to follow the dictum contained in the decision of the court in the case of Ronald v Mutual Reserve Fund Life Association, 132 N. Y. 378 (which is the only case relied upon by counsel for the defendant in error as sustaining his contention that the statute does not apply to the defendant company,) for the reason that the statute of 1885 was not called to the attention of the court in the Ronald case.

The Court of Appeals of New York in the case of McDougall v Provident Savings Life Assurance Soc., 32 N. E. 251 on this question uses the following language:–

"Upon the construction of this statute the appellant's counsel have made an elaborate argument to the effect that it can not be applicable to this kind of a contract. * * * * * We should hesitate to call in question the applicability of the statute to any class of life insurance policies. It was intended to, and undoubtedly does, subserve a useful purpose, in throwing about the contract between insurer and the assured reasonable safeguards against a forfeiture or the lapsing of the interest of the assured."

The notice of forfeiture provided for in the statute must be given the assured, and unless it is given the policy is in full force and effect no matter how long or how much the assured may be delinquent in his payments. The giving of the notice is a condition precedent to the right of the company to declare a forfeiture.

Provident Savings Life Assurance Soc. v Nixon, 73 Fed. 144;

Phinney v Mutual Life Ins. Co., 67 Fed. 499;

Griffith v New York Life Ins. Co., 36 Pac. 113;

Griesemer v The Mutual Life Ins. Co., 10 Wash. 202;

Baxter v Brooklyn Life Ins. Co., 119 N. Y. 450;

Phelan v Insurance Co., 113 N. Y. 147;

Carter v Insurance Co., 110 N. Y. 15.

The notices provided for in the statute can not be waived by any provision to that effect in the policy;

Phinney v Mutual Life Ins. Co., 67 Fed. 499;

Griffith v New York Life Ins. Co., 36 Pac. 113;

Warner v National Life Ass'n., 58 N. W. 667.

The judgment is right even if notice was mailed in time, as the notice does not conform to the statute.

The notice requires the assured to pay the premium "within thirty days from the *date* of this notice," (Transcript page 55,) whereas the statute requires it to be paid within a certain time after "the *mailing* of said notice. The date of the notice is of no consequence at all.

The case of Phelan v Insurance Company, 113 New York 147 is directly in point on this question.

Again, the statute requires the notice to state the date when the premium is due. The notice in this case states it is *now* due (June 1st, 1893,) (Transcript page 255,) when in truth and in fact it was not due until July 1st, 1893, as

admitted in 7th paragraph of defendant's answer, (Transcript page 34,) and stipulation of facts (Transcript page 48.)

There is no testimony as to the date of the mailing of said notice except the deposition of Bennett W. T. Amsden, and his testimony is entirely heresay as shown by his evidence (Transcript page 52,) and admitted over objection of plaintiff, (Transcript page 48.) That this is not a sufficient showing in regard to the mailing of the notice has been decided by this Court in the case of the Provident Savings Life Assurance Association v Nixon, 73 Fed. 144.

Specifications of error need not be considered, because they are aimed at the opinion of the court and not at the decree rendered.

McFarlane v Golling *et al.*, 22 C. C. A. 23;

Calverly v Deere, 13 C. C. A. 452;

Russell v Kern, 69 Fed. 94; 16 C. C. 154;

British Queen Mining Co. v Baker Silver Mining Co., 11 Sup. Court Rep. 523, 139 U. S. 222;

Dickinson v Planters' Bank, 16 Wall. 250;

Lehnen v Dickson, 13 Supreme Court Rep. 481, 11 C. C. A. 42;

Adkins v W. & J. Sloane, 60 Fed. 344,(good case;) On Rehearing, 61 Fed. 791;

National Bank of Commerce v First National Bank, 61 Fed. 80).

There was no objection to the findings or judgment in this case when made by the trial court and they can not be now considered for the first time.

Press v Davis *et al.*, 54 Fed. 267.

The counsel for defendant in error has taken up considerable portion of his brief contending that the notice in evidence in this case was given in time; in reply to this contention I content myself by citing this Court to the case of Hicks et al. v National Life Ins. Co., 60 Fed. 690, a case decided in the Circuit Court of Appeals, Second Circuit, sitting in the District of New York and construing this statute, in the above case the notice was mailed on the 2d. day of November and informed the assured that he must pay his premium on December 2d., and the court held this was only twenty-nine days' notice and that the defendant was in no better position than it would be if no notice had been mailed. The above case is identical with the one at bar and this Court to hold that the notice in this case was mailed "at least thirty days prior to the day when the premium is payable," must overrule the above court construing the statutes of its own circuit.

For the reasons above stated we contend that the judgment of the trial court was correct and ought to be affirmed.

Respectfully submitted,

ALFRED A. FRASER,

Attorney for Defendant in Error.

No. 392

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION,
Plaintiff in Error,

vs.

J. K. DUBOIS, as Administrator of the Estate of EDWARD JAY CURTIS, Deceased,
Defendant in Error.

Closing Brief of Plaintiff in Error.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

In the United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCIATION,

Plaintiff in Error,

vs.

J. K. DU BOIS, As Administrator of the Estate of Edward J. Curtis, Deceased,

Defendant in Error.

Closing Brief of Plaintiff in Error.

Since the filing of the opening brief herein on behalf of the plaintiff in error, my attention has been called by the general counsel of the company to the fact that the Act which the Court below held applicable to the plaintiff in error, and as requiring it to give thirty days notice of the falling due of an of assessment, was repealed by the Legislature of New York in 1892, and therefore, was not in force at the time of the death of the insured, December 29, 1895.

I was not called into this litigation until after the

trial of the case and the denial of the motion for a new trial, and, therefore, naturally fell into the belief that the Act which the trial court applied to the policy was still in force. The General Counsel for the company, however, having informed me of my mistake, it is of course my duty to bring the fact of the repeal to the attention of the Court.

Before referring to the repealing Act, however, it may be stated that the latter simply adds force to and makes clearer what is said in the opening brief.

By an Act of May 18, 1892, now known as Chapter 38 of the General Laws of New York, the Legislature of that State declared that such new Act "shall be applicable to all corporations authorized by law to make insurance," and repealed all prior laws relating to insurance companies, including the Act of 1876, as amended in 1877, under which the Court below held the notice of the falling due of assessment No. 68 insufficient, and the Act of 1883 relied upon by plaintiff in error.

2 *Revised Statutes of New York*, (9th Ed.) p. 1131, sec. 1 and p. 1243, sec. 290.

Article II of the said Act is entitled "*Life*, *Health* or *Casualty* Insurance Companies" while Article VI thereof is entitled "Life or Casualty Corporations upon the *Co-operative or Assessment Plan*,"

Section 209 of the new Act which is found in Arcticle VI, declares: "Every corporation, company, society, organization or association of this or any other

State or country, *transacting the business of life* or casualty insurance upon the *co-operative or assessment plan*, as declared in this Article, including those heretofore organized with a capital stock and transacting such business, but not including any that shall hereafter be organized with a capital stock, *shall be subject to all the provisions of this article, and not* to the provisions of *Article II.*"

Id., p. 1216.

The Article to the provisions of which insurance companies doing business upon the co-operative or assessment plan are thus made subject is Article VI, which Article in Section 201 continues in force Section 5 of the Act of 1883, as amended in 1887, and in Section 210 continues in force, Section 17 of the said Act of 1883.

Id, pp. 1243, 1208, 1218.

Sections 201 and 210 of the Act now in force in New York, being identical with respectively Sections 5 and 17 of the Act of 1883, relied upon by plaintiff in error in its opening brief, the argument and authorities in the opening brief in reference to the Act of 1883, are equally applicable to Chapter VI of the Act of 1892; and plaintiff in error was subject only to said Article VI, and not to the provisions of Article II of said Act, and the notice given by it in this case being in compliance with said Article VI, was a good and sufficient notice.

In *Greenwald* v. *United Life Accident Association*, 42 New York, Supplement, 973, it was held that an insurance company doing business upon the assessment plan was required to give only the notice provided for by said Section 210 of the Act of 1892.

In *Bopple* v. *Supreme Tent of Knights of Maccabees*, 45 New York, Supplement, 1096, the Act of 1892 provided that fraternal societies should be subject to the provisions of Article VII of the Act only, and it was held that fraternal socities were not subject to the provisions of Article II, thus giving effect to the similar provision in relation to assessment companies that they shall be subject only to the provisions of Article VI.

So in *O'Grady* v. *New York Mutual Live Stock Ins. Co.*, 16 Appellate Division (N. Y.) 567, it was held that a co-operative live stock insurance company was subject only to the provisions of Article VIII of the said Act of 1892, that article dealing specifically with live stock insurance companies organized upon the assessment plan.

The Act of 1876, as amended in 1877, and under which the Court below held that thirty days notice of assessment No. 68 should have been given the insured, is contained in a modified form, in Section 92 of Article II of the said Act of 1892.

2 Revised Statutes of New York (9th ed) p. 1174.

But, as we have seen an insurance company doing business upon the corporative or assessment plan, is expressly declared by the Act of 1892, *not* to be subject to the provisions of said Article II.

Were the plaintiff in error, however, subject to the provisions of Article II, the notice of assessment No. 68 would have been a full compliance with the provisions of that Article, for the said article requires a notice of only 15 days to be given of an assessment.

The language of Section 92 is as follows: "No life insurance corporation doing business in this State shall declare forfeited or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract of one year or less, nor shall any such policy be forfeited or lapsed by reason of non-payment when due of any premium, interest for installment, or any portion thereof required by the terms of the policy to be paid, unless a written or printed notice, stating the amount of such premium, interest, installment or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation, or by an officer thereof, or persons

appointed by it to collect such premium, at least *fifteen* and not more than forty-five days prior to the the day when the same is payable."

The notice of assessment No. 68 was held by the Court below to be but a twenty-nine days' notice, but as the law of 1876, as amended in 1877, had been repealed, and the said Article II required but a fifteen days' notice it is evident that, under either Article VI or Article II of the Act of 1892, the notice was sufficient.

The inapplicability, however, of said Section 92 is evident upon its face.

1st. It has reference to only policies "hereafter issued or renewed."

2d. It specially excepts from the operation thereof "a term insurance contract for one year or less,"

3d. It speaks only of premium and installment policies, and carefully abstains from any mention of assessment policies which are especially dealt with in Article VI of the Act.

The policy in this case is either not a "hereafter issued or renewed" policy; or it is "a term insurance contract for one year or less, for it expressly provides that: "This contract on the part of the association is a *bi-montly term contract*, renewable at the option of the member before expiration. (Transcript p. 24). The policy is not a premium or installment policy.

I have been requested by the general counsel for the plaintiff in error to make a point, which, in view of the very evident unsoundness of the holding of the learned judge below as to the notice of assessment No. 68 being but a twenty-nine days' notice, I thought superfluous to refer to in my former brief, and which, in the light of the Act of 1892, only now brought to my attention, is beyond any question superfluous. Out of deference, however, to the learned counsel, and, at the same time, with a full appreciation of the strength of the point, I will briefly refer to it.

The provision of the Act of 1876, as amended in 1877, as to thirty days' notice, which the learned judge below thought was still in force, and, therefore, applicable to the policy in this case, immediately preceding the part thereof quoted at page 19 of the opening brief of plaintiff in error, provides: "Whenever any premiums or interest due upon any policy shall remain unpaid when due, a written or printed notice stating the amount of such premiums or interest due on such policy, the place where said premium or interest shall be paid, and the person to whom the same is payable shall be duly addressed and mailed to the person whose life is assured or the assignee of the policy, if notice of the assignment has been given the company, at his or her last known postoffice address, postage paid by the company, or by an agent of such company or person appointed by it to collect such premiums. Such notice shall further state that

unless the said premium or interest then due shall be paid to the company or a duly appointed agent or other person authorized to collect such premiums within thirty days after the mailing of such notice, the said policy and all payments thereon will become forfeited and void. In case the payment demanded by such notice shall be made *within thirty days limited therefor*, the same shall be taken to be in full compliance with the requirements of the policy in respect to the payment of said premium or interest, anything therein contained to the contrary notwithstanding; but no such policy shall in any case be forfeited or declared forfeited as lapsed until the expiration of *thirty days* after the mailing of such notice."

Under this provision, even if it had been in force, the notice given by the plaintiff in error was sufficient for it was a notice requiring the payment of the premium within thirty days after the mailing of the notice.

The constitution and by-laws of the plaintiff in error, which form part of the certificate of insurance, provide that "on the *first week day* of the months of February, April, *June*, August, October and December of each year" an assessment shall be levied (Trans., p. 43), and that a failure to pay the assessment *within thirty days* from the *first week day* of February, April, *June*, August, October and December * * * shall forfeit his membership in this association, with all right thereunder, and the certifi-

cate of membership shall be null and void" (Id., p. 43).

Similar provisions are contained in the certificate itself. The policy is declared to be issued upon the condition of the payment of all mortuary premiums, payable at the home office of the association "*within thirty days from the first week day* of the months of February, April, *June*, August, October and December of each and every year." (Id., p. 15.) "*Within thirty days from the first week day* of February, April, *June* * * * of each year, * * * there shall be payable to the association a mortuary premium," etc. (Trans., pp. 16, 17.) "In the event of the non-receipt by a member of a mortuary premium notice on or before the first week day of February, April, June, * * * of each and every year, it shall be nevertheless a condition precedent to the continuance of this certificate or policy of insurance in force, that an amount equal at least to the amount of the next preceding mortuary premium paid shall be paid said association *within thirty days from the first week day* of February, April, *June* * * * of each and every year. Notice that a mortuary premium *is payable* to said association on the *first week day* of February, April, *June* * * * of each and every year is hereby given and accepted (Trans., pp. 20, 21).

These various provisions made the assessment or Mortuary Call No. 68 due June 1st, and allowed the insured thirty days thereafter within which to pay the

same, and as the notice of the assessment was mailed the insured on June 1st, and expressly notified him that: "The above Mortuary Call is *now due and payable*, and should be paid *at once*. If not paid on or before July 1, 1893 the policy will expire and become null and void;" (Trans. p. 55.) it results that the notice was clearly a notice sent after assessment No. 68 became due, and that the failure of the insured to pay the same within thirty days after June 1st, to-wit, on or before July 1st, caused the certificate to expire and become null and void.

In addition to the authorities cited on page 10 of plaintiff in error's opening brief to the point that the non-payment of assessment No. 68 within the time required for its payment, if notice thereof was properly given, or if notice thereof was not required, terminated the policy, a point, however, that apparently is not contested by respondent, I desire to call the attention of the Court to the following cases, which, being decisions of the New York Court of Appeals on provisions similar to those found in the policy in this case, are decisive of such point.

Roehner vs. *Knickerbocker Life Ins. Co.*, 63 N. Y. 160.

Evans vs. *United States Life Ins. Co.*, 64, *Id.* 304.

Robertson vs. *Metropolitan Life Ins. Co.* 88, *Id.* 541.

Attorney-General vs. *Continental Life Ins. Co.* 93, *Id.* 70.

Holly vs. *Metropolitan Life Ins. Co.* 105, *Id.* 437.
Fowler vs. *Metropolitan Life Ins. Co.* 116, *Id.* 389.
See also *New York Life Ins. Co.* vs. *Statham*, 93, U. S. 24.

As to the motion of defendant in error to dismiss and affirm.

I.

One of the grounds of this motion is that the bill of exceptions was not signed in time, because the trial was had at the December term of the court, and the signature of the Judge was not affixed thereto until after the expiration of that term.

But the rules of the Circuit Court for the Ninth District do not contemplate the signing or even presentation of a bill of exceptions at the same term at which a case is tried, and, on the contrary, provide for the presentation and signing of a bill after the expiration of the term

Rule 25 of the Court is as follows: "Where exceptions are taken, or there is a demurrer to evidence, the party shall not be required to prepare at the trial his bill of exceptions, or demurrer and statement of evidence, but shall merely reduce such exceptions to writing, or make a minute of the demurrer to the evidence, as the case may be, and deliver it to the Judge. The bill or demurrer shall, within ten days after the termi-

nation of the trial be drawn up, filed, and a copy be served on the attorney of the adverse party, who, within five days thereafter, may prepare, serve, and file amendments thereto; and in default thereof, the right to propose amendments shall be deemed waived, in which case, within five days thereafter, the proposed bill may be presented by the moving party to the Judge for allowance. If amendments are served and filed within the time allowed, they shall be deemed assented to by the party proposing the bill, and may in like time and manner, be presented to the Judge for allowance, unless the said party within three days after receiving a copy of such amendments, shall notify the opposing attorney of his dissent, and that at a time and place specified, not more than two nor more than five days distant, he will present the proposed bill and amendments to the Judge for settlement, and in that case the said bill shall be so presented," etc., etc.

This rule is substantially similar to the rule in *Chateaugay Ore and Iron Co., Petitioner*, 128 U. S. 544, under which it was held that a bill of exception need not be signed during the term at which the trial was had.

To the same effect are the cases of *Bank* vs. *Eldred*, 143 U. S. 293, 298, *United States* vs. *Jones*, 149, *Id.* 262 and *Missouri K. & T. Ry. Co.* vs. *Russell*, 60 Fed. Rep. 501.

The cases cited in the brief of defendant in error are cases in which there was no standing rule of the

Court regulating the presentation and settlement of bills of exceptions.

II.

The bill of exceptions in no way violates Rule 10 or any other rule of this Court, and is in all respects a proper one. The objections made to it are that it contains extraneous matter upon which no exception, objection or assignment of error is predicated. The objection is due to a misconception of counsel for defendant in error of the object of the bill of exceptions, which is to bring to this Court merely the point that the findings or agreed statement of facts do not justify the judgment. The bill does not seek to question any rulings of the Court in the course of the trial. The alleged extraneous matter is not pointed out, and Rule 10 of this Court has reference solely to charges of the Court to juries and has no application here.

III.

The object of the writ of error in this case is to bring before this Court the question whether the findings or agreed statement of facts justify the judgment. It is not necessary, in order to raise such question in this court that the plaintiff in error should have made an objection to the admission or rejection of evidence, or asked an instruction in the nature of a demurrer to the evidence.

The question whether the facts found or agreed

to justify the judgment is always before this court, on a writ of error, for error apparent on the face of the record need not be presented by a bill of exceptions.

Young v. *Martin*, 8 Wall., 354, 357; *Moline Plow Co.* v. *Webb*, 141 U. S., 616, 623; *Washington R. R. Co.* v. *Coeur D'Alene Ry. Co.*, 15 U. S. Ap., 359, 366.

The assignment of errors specifies that the Court erred in ordering judgment for the plaintiff in the action and also in not ordering judgment for the defendant therein. These two questions are the only questions before this court, and being properly before it, are to be determined.

As stated, it is not necessary, in order that a writ of error shall bring before this Court the question of the sufficiency of the findings or agreed statement of facts to justify the judgment, that an objection of any kind should have been made in the lower court.

IV.

Reply to Brief of Defendant in Error.

The answer of the plaintiff in error alleges that at all the times mentioned in the complaint it was a corporation, existing and doing business under certain laws of the State of New York. That it was and is an insurance corporation is admitted. That it was doing business upon the assessment plan appears conclusively from the certificate of insurance, which is annexed to and made part of the complaint, and the very question before the Court below was

whether or not the certificate had lapsed for failure of the insured to pay an assessment levied upon him. Under what laws it was doing business is a question of law to be determined upon an examination of the laws of New York, and the ascertainment thereby of what laws apply to a corporation doing business upon the assessment plan. Such an examination of the laws of New York shows that prior to the repealing Act of 1892, the plaintiff in error was subject to and governed by the Act of 1883, and that since the enactment of the statute of 1892 it has been and is subject to said last mentioned statute.

Section 700 of the Revised Statutes provides that in a civil cause tried by the Court without a jury, "when the finding is special the review may extend to the determination of the sufficiency of the facts to support the judgment."

In this case a jury was waived by agreement of the parties, and the case submitted to the Court upon an agreed statement of facts.

A case may be submitted to the Court upon an agreed statement of facts, and such statement will take the place of a special finding, and in such case it is unnecessary that there shall be any bill of exceptions in order to enable this Court to review the same on a writ of error.

Stimpson vs. *Baltimore & Susquehanna R. R. Co.*, 10 How. 328, 345–7.

Graham vs. *Bayne*, 18 *Id.* 60, 62.

Guild vs. *Frontin*, *Id.* 135.

Campbell vs. *Boyreax*, 21 *Id.* 223, 226.
England vs. *Gebhardt*, 112 U. S. 502, 505.
Rogers vs. *United States*, 141 *Id.* 548, 554.

An agreed statement of facts is equivalent to a special verdict, and presents questions of law for the consideration of the Appellate Court, and such Court has authority to determine, as in the case of a special verdict, whether the facts set forth in such statement are sufficient in law to support the judgment, although the finding of the Circuit Court on them be in form generally.

Supervisors vs. *Kennicott*, 103, U. S. 554.

Where a jury is waived, and the case is tried by the Court, the Court's finding of facts, whether general or special, has the same effect as the verdict of a jury, and although a bill of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the Court, which is equivalent to a special verdict, are sufficient in law to support the judgment may be reviewed on a writ of error without any bill of exceptions.

Allen vs. *St. Louis Bank*, 120 U. S. 20, 30.

Where the Court below makes special findings, (or what is the same thing, when there is an agreed statement of facts), no exception is necessary to raise the question whether the facts support the judgment.

Seerberger vs. *Schlesinger*, 152 U. S. 581.
Jennisons vs. *Leonard*, 21 Wall. 302, 307.

As we have shown, supra, however, the question

whether the facts found support the judgment, is always before this Court on writ of error.

It is suggested by counsel for defendant in error, that the agreed statement of facts is not the equivalent of a special finding because an affidavit forms part of it. The cases cited in support of the proposition, however, are not in point. All they decide is that a mere statement or recapitulation of the evidence, which requires the Court to weigh the evidence, cannot be regarded as an agreed statement of facts. The agreed statement of facts in this case is not a statement or recapitulation of evidence, and does not require the Court to weigh conflicting statements. It sets out specifically certain facts as facts in the case, and provides that the affidavit of B. W. F. Amsden "shall constitute a part of this agreed statement of facts." The affidavit in question is itself a mere statement of additional facts, stated as clearly and tersely, and in the same manner, as said facts would appear in the agreed statement, if specifically set forth therein, and forms part of the statement in exactly the same manner as if the facts therein set forth were specifically set forth in the statement. That an affidavit may form part of an agreed statement of facts is declared in *Baltimore and Potomac R. R. Co.* vs. *Trustees*, 91 U. S., 127, 130.

No evidence was introduced by the defendant in error, nor was there anything in the agreed statement, to show that the Act of New York of 1876, as amended in 1877, applied to the plaintiff in error. The Court below, however, took judicial notice of the laws

of New York and applied to the plaintiff in error the law of that State that appeared to it to govern plaintiff in error. It is now said by counsel for defendant in error that it is too late for the plaintiff in error to raise the question of the inapplicability to it of said law. The plaintiff in error has never claimed that it was subject to the Act of 1876, as amended in 1877, and, while the agreed statement of facts shows that the notice sent the insured of assessment No. 68 fully met all the requirements of that law, the plaintiff in error in no way estopped itself from claiming that said law did not apply to it. As a matter of law, even if the parties had agreed in the statements of facts that the Act of 1876 as amended in 1877, controlled the certificate in this case, they would not be bound by such statements, for the question of what law governed the certificate was one of law to be determined by the Court by taking judicial notice of the laws of New York. And this Court, on the hearing of the writ of error, likewise takes judicial notice of the laws of New York, and determines from its knowledge derived in such way what particular laws of that State govern the plaintiff in error.

In *Fourth National Bank* vs. *Franklyn*, 120 U. S., 747, 751, the case was tried in the U. S. Circuit Court for the Southern District of N. Y. The suit was to determine a stockholder's liability to a creditor of a corporation, arising under the laws of the State of Rhode Island, and was heard upon an agreed statement of facts in which the parties set forth that the corpora-

tion was subject to certain laws of Rhode Island, which laws appeared at length in the statement.

On writ of error to the Supreme Court of the United States, it was held that the plaintiff in error was not bound by the agreed statement, and that the Court would take judicial notice that said laws had been repealed.

Court: "In the Court below, statutes and decisions of Rhode Island were agreed or proved and found as facts, in seeming forgetfulness of the settled rule that the Circuit Court of the United States, as well as this Court on appeal or error from that Court, takes judicial notice of the laws of every State of the Union. *Hawley* vs. *Donoghue*, 116 U. S., 1, 6, and cases there collected. No reference was made to the statute of 1877 c 600, to which the plaintiff has now referred, and which repeals and modifies in some respects the statutes agreed and found on the record to be still in force, and it is contended for the defendant that this Court should not reverse a judgment on a ground which was not presented to the court below. This is doubtless the general rule, but it would be unreasonable to apply it when the effect would be to make the rights of the parties depend upon a statute which, as we know and are judicially bound to know, is not the statute that governs the case."

In *Lamar* v. *Micou*, 114 U. S., 218, 223, it was declared: "The law of any State of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the Courts of the United States are

bound to take judicial notice, without plea or proof."

In *Hawley* v. *Donoghue*, 116 U. S., 1, 6, it was said: "When exercising an original jurisdiction under the constitution and laws of the United States, this court, as well as every other court of the National Government, doubtless takes notice without proof, of the laws of each of the United States. But in this Court exercising an appellate jurisdiction, whatever was matter of law in the Court appealed from is matter of law here, and whatever was matter of fact in the Court appealed from is matter of fact here. In the exercise of its general appellate jurisdiction from a lower court of the United States, this Court takes judicial notice of the laws of every State of the Union, because those laws are known to the Court as laws alone, needing no averment or proof."

The public laws of a State may be read in the appellate court, *Leland* v. *Wilkinson*, 16 Peters, 317, 321, 322.

I am unable to find anything in *City of Findlay* v. *Pertz*, 20 C. C. A., 662, cited by counsel for defendant in error that has any bearing upon this question.

As to the inapplicability to plaintiff in error of the laws of New York of 1876, as amended in 1877, it is unnecessary for me to make a special reply to the brief of defendant in error, as the point is fully covered by my opening brief and the first part of the present brief.

The case of *Jacklin* v. *National Life Assn.*, 24 N. Y., Supplement, 746, is the decision of an inferior court

of New York, and, of course, cannot be said to overrule *Ronald* v. *Mutual Reserve Fund Life Assn.*, decided by the Court of Appeals of New York, in which the Court of Appeals expressly decided that the Act of 1876, as amended in 1877, did not apply to plaintiff in error.

In the case of *McDougal* vs. *Provident Life Savings Assoc.* likewise cited by counsel for defendant in error the question argued was simply whether the Act of 1876, as amended in 1877, applied to a policy of insurance which was required to be renewed each year by the payment of an annual premium, and the Court stated that it was unnecessary to determine the question, as the appeal would be decided on another point.

It is said that the notice of assessment 68 did not comply with the provisions of the Act of 1876, as amended in 1877, because it required the payment of the assessment within thirty days from the date of the notice, while the Act provides for the payment within a certain time after the mailing of the notice. Assuming the Act in question to be applicable to the plaintiff in error, and that the notice given was a notice before the assessment was due, the notice fully met the requirements of the Act. The notice was mailed on June 1st, and was dated June 1st, so that when it required payment within thirty days from the "date of this notice," it called for payment within thirty days from "the mailing of said notice" for the two dates were the same. The said Act does not declare that the notice shall be in any particular

form, but only that it shall require the payment of the assessment within thirty days from the date on which the notice is mailed. The notice in question did require the payment to be made within thirty days from a date, which was the date on which the notice was mailed.

In *McDougall* vs. *Provident Savings Life Assurance Society*, 135 N. Y. 551, 555, referred to supra, the notice of the yearly premium stated that the premium would be due and payable July 23, 1888, and that it must be paid "on or before the date above mentioned." No mention was made in the notice of the day of mailing, and it was held that the notice fully met the requirements of the said Act of 1876, as amended in 1877. Speaking of the notice and the case of *Phelan* vs. *Northwestern Life Insurance Company*, 113 N. Y. 147, cited in the brief of defendant in error, the Court there say: "This notice would seem to be very definite in its statement; but the respondents say, and the Court below has thought, that it is not in conformity with the provisions of the statute for not literally following the statutory language. In support of this they cite *Phelan* vs. *Northwestern Mutual Life Insurance Co.*, (113 N. Y. 14) where this Court held a notice insufficient. The notice there was that 'the conditions of your policy are that payment must be made on or before the day the premium is due and members neglecting so to pay are carrying their own risk,' and what was condemned was the use of language not intelligible to all. To say that persons are 'carrying

their own risk' is not plainly embodying the notice which the statute requires and might be incomprehensible to those unlearned in insurance phraseology. * * * The statute was not meant to operate harshly upon the insurer, but to afford a protection to the assured by the reasonable requirement of a notice, couched in plain terms from the insurer, before the interest of the insured could be forfeited. To hold that where every essential fact required to be known is intelligibly stated in the notice, it may be disregarded, if not literally following the work of the statutory provision, would be a most harsh and unwarrantable construction."

The assessment as shown *supra*, was clearly due and payable on June 1, 1893, and the insured had thirty days of grace thereafter, under the certificate, during which he might make the payment. The statement in the answer that the assessment became due and payable July 1, 1893 is a clerical error.

Amsden, in his affidavit, states, transcript, p. 51, that notice of the assessment enclosed in a sealed envelope, properly addressed, and stamped, was deposited "in the general postoffice in the City of New York by this deponent at 5 o'clock in the afternoon of the 1st day of June, 1893." There is nothing hearsay about this, and if it were hearsay, that fact would make no difference, because the facts stated in the affidavit form part of the agreed statement of facts.

At the close of his brief counsel for defendant finally refers to the point upon which the lower court based its decision, namely, that the notice of assessment No. 68 was not a thirty days' notice. In support of the decision counsel for defendant in error cites but a single case, *Hicks* v. *National Life Ins. Co.*, 60 Fed., 690, and instead of attempting to show the soundness of that decision, pleads that it be followed, because otherwise this Court "must overrule the above Court construing the statute of its own circuit." This Court will certainly not follow a decision which has not a single case in its support, and which is opposed by such a vast current of authorities as is cited in the opening brief for plaintiff in error.

Were the Court inclined, however, to follow that case, it would be unable to do so, for the certificate is required to be construed according to the laws of New York, and, under those laws, the notice was clearly a thirty days' notice.

Upon the agreed statement of facts the plaintiff in error is clearly entitled to a judgment that the plaintiff in the action take nothing, and it is respectfully submitted that the judgment should be reversed, with directions to the court below to enter judgment in favor of the defendant in the action, the plaintiff in error here.

I. B. L. BRANDT,

Of Counsel for Plaintiff in Error.

No. 392.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MUTUAL RESERVE FUND LIFE ASSOCIATION (a Corporation)
Plaintiff in Error,

vs.

J. K. DUBOIS, as Administrator of the Estate of EDWARD J. CURTIS, Deceased,
Defendant in Error.

PETITION FOR REHEARING

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

Filed, March..... 1898

In the United States Circuit Court of Appeals for the Ninth Circuit.

MUTUAL RESERVE FUND LIFE ASSOCIATION (a corporation),
Plaintiff in Error.
vs.
J. K. DuBOIS, as Administrator of the Estate of EDWARD J. CURTIS, deceased.
Defendant in Error.

Petition for Re-hearing.

The plaintiff in error respectfully asks for a re-hearing herein.

The action was brought by the defendant in error, as administrator of the estate of Edward J. Curtis, deceased, to recover the sum of $6,000, on a certificate of insurance issued by the plaintiff in error to the said Curtis.

The defense interposed to the action was that the deceased had failed and neglected to pay an assessment duly levied upon him by the plaintiff in error in accordance with the terms of his certificate, and that the certificate had, in consequence thereof, lapsed and become void. The assessment in question became due

and payable on June 1st, 1893, and from that time to his death, December 29th, 1895, a period of over two and a half years, the deceased neither paid nor made any attempt to pay said assessment, or any subsequent assessment.

Judgment was rendered in the lower Court in favor of the defendant in error, for the sum of $6530, on the ground that the notice of the assessment given the deceased did not comply with the law, in that, the law required a notice of thirty days to be given the deceased of the falling due of an assessment, and the notice in question was not a thirty days' notice.

The opening brief of the plaintiff in error, filed in this Court, however, shows conclusively that the Court below erred in holding that the notice given the deceased was not a thirty days' notice, and that the decisions are practically unanimous that such a notice is a thirty days' notice. The number of cases cited by the plaintiff in error on this point was so large, and the decisions so clearly established the error of the Court below, that counsel for the defendant in error practically abandoned all effort to support the judgment in this Court, and, in his brief of twenty-seven pages, devoted but half a page to the judgment, and then merely for the purpose of citing a single decision which has been disapproved of by every Court whose attention has been called to it, and particularly by the Courts of New York whose decisions enter into and form part of the contract, and govern the construction of the certificate of insurance.

And in the reply brief filed by the plaintiff in error it was made clear that the law which the lower Court, taking judicial notice of the laws of New York, had held applicable to the certificate and as requiring a thirty days' notice, had been repealed prior to the assessment, and that the law which did apply to the certificate had been fully complied with by the plaintiff in error.

Counsel for the defendant in error, abandoning all hope of controverting the contention of the plaintiff in error as to the unsoundness of the judgment, exerted himself in his brief to prevent a consideration of the judgment by this Court upon purely technical grounds; and, in its opinion delivered herein on February 7th, 1898, this Honorable Court held the objections of the defendant in error to a review of the judgment by this Court to be well taken, and declared that the record presented no question for the consideration of this Court.

The particulars in which this Court held the record insufficient were :

1. "The agreed statement of facts is, therefore, merely a report of the evidence, and, whether it appears in the opinion of the Court, or in the bill of exceptions, it cannot be deemed a special finding."

2. "The insufficiency of the records in the present case is still further disclosed in the assignments of error, which are directed mainly to the opinion of the Court, and cannot be considered, since the opinion of the Court is no part of the record."

We respectfully submit that in both these particulars the opinion of this Honorable Court is erroneous, and

that the record is sufficient, not only to authorize this Court to review the judgment, but to require a reversal of the judgment, and we therefore ask for a rehearing herein.

The grounds upon which the opinion declares the agreed statement of facts to be insufficient, is that the statement consists in part of an affidavit of one Amsden, and therefore does not purport to be a statement of the ultimate facts, but merely of evidence, and the opinion of the Court in *Kentucky Life and Accident Insurance Company* vs. *Hamilton*, 22 U. S. App. 559, is quoted from as holding "a similar record in that court," not to be an agreed statement of facts.

We think, however, that there is a clear distinction between the record in that case and the record in the present case, and that the language quoted from the decision in that case is not applicable to the record presented to this Court.

In the case in 22 U. S. App. it appears the agreed statement of facts set out "numerous applications, notices, letters, policies, charters and by-laws therein referred to as having been read upon the hearing," and it was said by the Court there, "an agreed statement of facts which will be accepted as the equivalent of a special finding of facts, must relate to and submit the ultimate conclusions of fact, and an agreement setting out the evidence upon which the ultimate facts must be found, is not within the rule stated in *Supervisors* vs. *Kennicott*, *supra*.

In the present case the agreed statement of facts expressly declares that the affidavit of Amsden "shall constitute a part of this agreed statement of

facts." The affidavit itself does not, as was complained of in the case just referred to, consist of a mass of evidence, but is merely a statement of but a single fact, namely : That on the first day of June, 1893, a notice of the assessment known as mortuary call No. 68, under the certificate or policy of Edward Jay Curtis, was mailed said Curtis to his address, Boise City, Idaho, and that said notice required the said Curtis to pay the amount of the said assessment on or before July 1st, 1893. This is the only fact set forth or mentioned in the affidavit, and it is an ultimate fact. What difference it can make, whether such fact appears in the body of the agreed statement of facts or as a separate and distinct statement which is made part of the agreed statement by reference we cannot perceive. The affidavit in question is not evidence tending to prove a fact ; it is a statement of the fact itself, and a statement as clear and direct as any of the statements contained in the body of the agreed statement of facts. If a special finding of facts had been filed by the lower Court and contained a finding upon the question of the giving of notice to Curtis of the falling due of mortuary call No. 68, such finding would not and could not have been clearer or more direct than the statement of Amsden. We would earnestly ask the Court that it again carefully examine the affidavit of Amsden, and observe how the affidavit is confined to but a single fact, namely the giving of notice of call No. 68 to Curtis. and how directly such fact is stated, and how impossible it would be to draw a finding in regard to the giving of the notice which would be

more direct or ultimate than the statement of Amsden.

In the case of *Supervisors* vs. *Kennicott*, 103 U. S. 554, cited by this Court to the point that the agreed statement of facts in this case is insufficient, there is nothing whatever said as to the sufficiency or insufficiency of any agreed statement of facts.

In *Lehnen* vs. *Dickson*, 148 U. S. 71, likewise cited to the same point there was no agreed statement of facts, and no remarks as to the force such a statement should take.

In that case, however, the Court did declare: "It is true, if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as the equivalent of a special finding of facts. *Supervisors* vs. *Kennicott*, 103 U. S. 554.

Doubtless, also, cases may arise in which without a formal special finding of facts, there is presented a ruling upon a matter of law, and in no manner a determination of facts, or of inferences from facts in which this Court ought to and will review the ruling. Thus in *Insurance Company* vs. *Tweed*, 7 Wall. 44, where on the agreement in this Court counsel agreed that certain recitals of fact made by the trial court in its opinion or (reasons for judgment), as it was called, were the facts in the case, and might be accepted as facts found by the Court, it was held that as they could have made such agreement in the Court below, it would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to upon which the judgment was based and upon an examination it was further held

that they did not support the judgment, and it was reversed."

In *Supervisors* vs. *Kennicott*, *supra:* there was an agreed statement of facts, and a general finding for the plaintiffs in the action. In the Supreme Court the defendant in error objected to an examination of the case upon the merits upon the ground that the finding of the Court was in form general and not special.

Speaking of this contention, the Court said: "This record shows distinctly that the Court was only required to determine whether in law, on the agreed facts, the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the Court found the issue in favor of the plaintiffs, but that, when read in connection with the bill of exceptions is no more than a declaration that the Court found the law to be in favor of the plaintiff on the case as stated," and the Court thereupon proceeded to review the judgment and to declare: "The single question, therefore, was presented to the Court, whether on the agreed facts the county and its sureties were liable in law to the extent of their bond for the accumulation of interest or the balance of the mortgage debt. The judgment was to the effect that they were. In this we think there was error." The judgment was accordingly reversed.

This case falls exactly within the rule laid down and followed in the two cases last quoted from. The facts having been agreed to by the parties, there was no fact for the Court below to determine and there were pre sented to the Court below, as there are presented to

this Court, simply questions of law, namely, whether the insured was entitled to a formal notice of the assessment which became due on June 1st, 1893, and if he was entitled to such notice, whether the notice sent him complied with the law.

Attention is also seriously called to the clear distinction which can be drawn between the case at bar, and the case of *Raimond* v. *The Parish of Terrebone*, 132 U. S. 192, cited by this Honorable Court in its opinion.

A mere perusal of the statement in that case shows that the statement of facts depended upon therein, was in no respects similar or analogous to the agreed statement of facts in this case. The situation and the distinctions between that case and the present case are most clearly and distinctly summed up in the following language from Judge Gray's opinion in the case cited:

" In the present case the pleadings present issues of " fact; there is no bill of exceptions; the so-called " statement of facts is mainly a recapitulation of evi- " dence introduced by the parties at the trial. *The* " *case was not submitted to the decision of the Court upon* " *that statement only, but the Court made a further find-* " *ing as to what took place at the trial.* That finding " merely states that the parties admitted, so far as the " facts are stated in a certain reported opinion of the " Supreme Court of Louisiana, they were a correct " statement of the facts of this case, but that each " party claimed that there were additional facts as to " which there is no finding. * * * In short, there " is nothing in the present case which can be called in " any legal or proper sense either a statement of facts

" by the parties or a finding of facts by the Court, and " no question of law is presented in such a form as to " authorize this Court to consider it."

Assuming, however, for the purposes of the argument, that the statement of Amsden can form no part of the agreed statement of facts, the plaintiff in error is still clearly entitled to a reversal of the judgment.

The agreed statement of facts expressly declares:

"That said Edward J. Curtis failed to pay an assessment or mortuary call or premium, known as mortuary call No. 68 in the sum of $33.96 which became due, according to the terms of said policy of insurance, on the first day of July, 1893, and that the same has not been paid by said Edward J. Curtis, or any other person or persons for him; and that said non-payment was not condoned or acquiesced in by defendant; that other assessments, mortuary calls and premiums have become due and payable since said mortuary call No. 68, but none of them have been paid." Transcript, p. 48.

The certificate or policy of insurance is made a part of the complaint, and provides that the company will pay the legal representatives of the insured the sum of $6,000, "upon the further consideration of the payment of all mortuary premiums, payable at the home office of the association in the City of New York, or to an authorized collector, *within thirty days from the first week day* of the *months* of February, April, *June*, August, October and December of each and every year during the continuance of the certificate or policy of insurance, and subject to all the provisions, requirements and benefits stated on the second page of this cer-

tificate or policy of insurance, which are hereby referred to and made a part of this contract." Trans., p. 15.

Among the provisions and requirements thus made a part of the certificate, and upon the performance of which by the insured, the payment of the $6,000 is conditioned, are the following:

" In the event of the non-receipt by a member of a mortuary premium notice on or before the first week day of February, April, *June*, August, October and December of each and every year, it shall be, nevertheless, a condition precedent to the continuance of this certificate or policy in force, that an amount equal to the amount of the next preceding mortuary premium paid, *shall be paid said Association within thirty days from the first week day of* February, April, *June*, August, October and December of each and every year. *Notice that a mortuary premium is payable* to said Association *on the first week day of* February, April, *June*, August, October and December of each and every year, *is hereby given and accepted, and any further and other notice is expressly waived.*" Trans., pp. 20–21.

" This certificate or policy of insurance is also issued and accepted subject to the express condition that if any of the payments stipulated in this contract shall not be paid on or before the day of the date as provided in this contract, at the home office of the Association in the City of New York, or to a duly authorized collector of the Association, * * * then and in each and every such case the consideration of this contract shall be deemed to have failed, *and this certificate or policy of insurance shall be null*

and void, and all payments made thereon shall be forfeited to the Association." (Trans., p. 25.)

It will thus be seen from facts appearing of record that the payment of the $6,000 is expressly conditioned upon the payment by the insured of a mortuary premium within thirty days from the first day of June of each and every year; that in the event of the insured not receiving notice of a mortuary call on or before the first day of June it "shall be nevertheless a condition precedent to the continuance of this certificate or policy of insurance in force that an amount equal to the amount of the next preceding mortuary premium shall be paid said Association within thirty days from the first week day of June * * * of each and every year; that the insured expressly waived any other notice than that given by the certificate itself of the falling due of an assessment; and that no attempt has ever been made to pay call No. 68.

It is immaterial therefore whether notice of the falling due of assessment No. 68 was sent the insured or not. Under the provisions of the certificate of insurance the deceased not only was not entitled to notice of the falling due of the call, but he had expressly agreed that in the event of the non-receipt of notice he would pay a call to the association within thirty days of the first day of June of each and every year. He did not pay or attempt to pay call No. 68 within thirty days of the first week day of June of the year 1893, and, therefore, by the terms of the certificate, the certificate ceased to exist.

It is also provided in the certificate that: "This contract shall be governed by, subject to and construed

only according to the laws of the State of New York, the place of this contract being expressly agreed to be the home office of said Association in the City of New York (Trans., p. 24).

The decisions of the Courts of New York enter into and form part of the certificate of insurance and are binding and conclusive upon the Courts of the United States, and the Courts of the United States take judicial notice of such decisions. See opening brief of plaintiff in error herein, pages 10–11.

It is elementary law that a party may waive the provisions of a law intended for his benefit, and, in the absence of a prohibition in the Statute, the insured had a right to waive the giving of a notice to him on each occasion of the falling due of an assessment The statute applicable to this case (see opening brief of plaintiff in error, pages 2–4, and opening brief of plaintiff in error, pages 12–13) not only does not prohibit a waiver of notice but does not require notice to be given. All that the act does in reference to notice is to state what a notice shall set forth.

Under the decisions of the courts of New York which thus enter into and form part of the certificate, and in which state the contract of insurance was made, the insured had a right to waive notice of the falling due of an assessment and was not entitled to notice of assessment or call No. 68.

In *Roehner* vs. *Knickerbocker Life Ins. Co.*, 63 N. Y. 160, 163, it was declared by the Court of Appeals of New York, construing a policy substantially similar as to the provision for forfeiture for non-payment of premiums to the present policy:

"The argument of the appellant seems to reach to the extent that there could be no forfeiture of the policy by the defendant unless the intention so to do was, after the failure to pay the premium, made known by it to the holder of the policy.

"It is, however, well settled that on the failure of the insured to pay the premium on a policy like this, at the time therein stipulated therefor, it becomes lapsed and void. It is then no longer a contract enforceable against the insurer. In the case in hand it was the agreement between the contracting parties that the consideration for the undertaking of the defendant was that the insured had paid it in hand a certain sum at the making of the contract, and should on a certain day in each year thereafter, on or before a certain hour of that day, pay them the same sum. And it was expressly agreed that the omission to pay the same on the day named should then and thereafter cause the policy to be void. Considering the nature of the contract of life insurance, and how it binds the owner to a continuance of it, while the insured is not by the terms of the policy bound to pay, but has the privilege to do so or not, this was not an unwise condition for the defendant to insert. It was not illegal, nor can we say it was against public policy. When the contract was accepted upon those terms, the condition was an important part of it, and the insured was bound to a strict performance, before there could be a claim set up for a benefit under it, unless such performance was legally waived or modified. If the premium was not paid when the day for payment came, the policy was void, for the par-

ties to it have said so it should be. The forfeiture results from the non-payment alone, and from no other act."

Failure to make payment of a *premium*, or calls, at the office fixed for the payment thereof by the policy or certificate, the policy or certificate providing that in the event of such failure, the policy or certificate shall cease and become void, has always been held by the Court of Appeals of New York to terminate the policy without notice of any kind to the insured.

Robertson vs. *Metropolitan Life Ins. Co.*, 88 N. Y. 541.

Attorney-General vs. *Continental Life Ins. Co.*, 93 Id. 70, 73.

Holly vs. *Metropolitan Life Ins. Co.*, 105 Id, 437.

Fowler vs. *Metropolitan Life Ins. Co.*, 116 Id, 389.

The same conclusion has been reached by the Supreme Court of the United States.

New York Life Ins. Co., vs. *Statham*, 93 U. S. 24.

If, however, the affidavit of Amsden is merely matter of evidence and cannot be considered as part of the agreed statement of facts, and the agreed statement without such affidavit is insufficient, in the opinion of this Court, to establish the right of the defendant in error to a judgment in its favor, the judgment should clearly be reversed upon the ground that the agreed statement of facts is insufficient.

In the case of *The E. A. Packer*, 140 U. S., 360, 3,

it was said: "The rule is general that wherever the trial court finds the facts and conclusions of law therefrom, it is bound to find every fact material to its conclusions, and a refusal to do so, if properly excepted to is a ground for reversal. Thus, in cases tried by the Court without a jury, in Rev. Stat., 649 and 700, the findings of the Circuit Court Judge are conclusive upon this Court, and the power of this Court extends only to the sufficiency of the facts found to support the judgment. (*Tyng* vs. *Grinnel*, 92 U. S., 467) and if not sufficient the case may be remanded for trial upon other issues involved therein. (*ex parte French*, 91 U. S., 423) The findings of the Court under these sections are treated as a special verdict, and are guaged by the rules applicable to them. (*Norris* vs. *Jackson*, 9 Wall., 125; *Copelin* vs. *Phœnix Ins. Co.*, 9 Wall., 461; *Wayne County Supervisors* vs. *Kennecott*, 103 U. S., 554) and as was said in *Graham* vs. *Bayne*, 18 How., 60, 63, if a special verdict be ambiguous or imperfect, if it find *but the evidence of facts, and not the facts themselves*, or finds *but part of the facts in issue*, and is silent as to others, *it is a mistrial, and the court of error must order a* VENIRE DE NOVO. *They can render no judgment on an imperfect verdict or case stated.* Under a similar method of procedure in some of the States it is held that the findings must contain all the facts and circumstances necessary to a proper determination of the question involved, and in default thereof the judgment of the Court below will be reversed, and the case sent back for a new trial."

One of the defenses in this case, is that notice of the falling due of an assessment, No. 68, was duly given

the insured, and that the insured failed to pay the assessment within the time fixed for the payment thereof, and that by reason of such non-payment the certificate of insurance lapsed and became void. These matters are specially pleaded in the answer filed by the defendant in the action, the plaintiff in error here. If the affidavit of Amsden cannot be considered part of the agreed statement of facts it results that the agreed statement is wholly silent upon one of the issues in the case, namely: whether notice of the falling due of the assessment in question was given the insured.

As is shown by the cases cited in the closing brief herein of the plaintiff in error, an agreed statement of facts takes the place of a special finding and is to be tested by the same rules as a special finding. Thus tested, if the affidavit of Amsden must be excluded from consideration, and the agreed statement is insufficient to entitle the plaintiff in error to a reversal, the statement is fatally defective, and the Court below was without authority to render the judgment complained of, and, to quote again the opinion in The E. A. Packer case, *supra*, "it is a mistrial, and the court of error must order a *venire de novo*. They can render no judgment on an imperfect verdict or *case stated*.

In relation to the assignment of errors we do not ask the Court to review any evidence or any rulings of the Court below. All that we contend for is that the agreed statement of facts does not justify the judgment, and as the judgment is simply a judgment in favor of the plaintiff in the action for the amount of the policy and interest and costs, assignments that the Court erred in ordering judgment for the plaintiff,

and that it erred in not ordering judgment for the defendant would certainly seem to be sufficient.

The case of *Supervisors* vs. *Kennicott*, *supra*, is directly in point. In that case the assignment of error was simply that the Court erred in giving judgment for the plaintiffs, and it was held that the assignment was sufficient, and as we have seen, the Court reviewed the judgment, declared that the agreed statement of fac s did not justify it, and ordered a reversal.

If such assignments are not sufficient then the more specific assignments must be sufficient for they cover every point upon which the Court below must have based its decision in order to arrive at the judgment.

For instance the agreed statement of facts show that there became payable by the insured within thirty days from June 1st, 1893, an assessment upon his certificate, and that he failed to pay the same. The certificate which is made part of the complaint declares that non-payment of any assessment within the time fixed for the payment thereof voids the certificate. When the Court, therefore, rendered judgment for the plaintiff below, it must have held "that the failure by the deceased to pay the assessment or mortuary call No. 68 did not operate as a forfeiture of the policy of insurance in this case, and that notwithstanding such failure and default, that said policy of insurance remained in full force and effect." An assignment of error that the Court erred in so deciding, specifically setting out the point (Transcript, page 84) is certainly a proper assignment of error.

This honorable Court is mistaken in saying that the

assignments of errors are to the opinion of the Court below. The assignment of errors takes up every point upon which the Court below must have decided adversely to the plaintiff in error in order to arrive at its judgment, and alleges error in each such respect. If the assignments of error are not sufficient we are at a loss how to draw an assignment of errors that will meet the approval of this Court. We earnestly invite the Court to a re-examination of the assignments of error.

It is said in the opinion of this Court that, "The laws of the State of New York appears to provide for different classes of life insurance associations, but there is no finding as to the particular class to which the defendant belongs, and this Court is not required to ascertain the fact by an examination of the evidence in order to determine the law applicable thereto."

It does not require an examination of the evidence to ascertain to which class of life insurance associations the plaintiff in error belongs. One of the classes mentioned in the laws of New York is companies "transacting the business of life or casualty insurance upon the *co-operative or assessment plan*." See closing brief of plaintiff in error, pages 2–3.

The certificate of insurance is made a part of the complaint, and shows upon its face that the plaintiff in error transacts business upon the co-operative or assessment plan, one of the conditions of the certificate being that, "within thirty days from the first week day of the months of February, April, June, August, October and December of each and every year during the continuance of this certificate or policy of insur-

ance, there shall be payable to the Association a mortuary premium for such an amount as the executive committee of the Association may deem requisite, which amount shall be at such rates, according to the age of each member, as may be established by the Board of Directors."

It is therefore an admitted fact in the case that the plaintiff in error transacts business upon the co-operative or assessment plan.

We think the plaintiff in error is clearly entitled to a reversal of the judgment and that a re-hearing should therefore be granted.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded, and that it is not interposed for delay.

I. B. L. BRANDT,
Of Counsel for Plaintiff in Error.

No. 393

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

MARY AGNES RYAN and CHARLES RYAN, Jr., a minor, and MARY RYAN, a minor, by their Guardian *ad litem* MARY AGNES RYAN,

Plaintiffs in Error,

vs.

C. J. SMITH, as Receiver, etc., of the Oregon Improvement Company, a Corporation,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the Circuit Court of the United States for the Northern District of California.

INDEX.

In the ***Circuit Court*** *of the United* ***States****, Ninth Circuit, Northern District of California.*

MARY AGNES RYAN and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by MARY AGNES RYAN

Plaintiffs.

vs.

C. J. SMITH, Receiver of the Oregon Improvement Company, a Corporation,

Defendant.

Petition for Appointment of Guardian ad Litem.

The petition of Mary Agnes Ryan respectfully shows to the Court

That she is the mother of Charles Ryan, Jr., and Mary Ryan, both of whom are minors under the age of five years; that Charles Ryan, the father of said minors, is dead; that said Charles Ryan was killed while in the employ of C. J. Smith, receiver of the Oregon Improvement Company, through the negligence of said receiver, or his servants or agents; that said minors have jointly with this petitioner, who is the widow of said Charles Ryan, a

cause of action against said receiver for causing the death of said Charles Ryan.

Wherefore, petitioner prays for an order appointing petitioner guardian ad litem to prosecute said action in behalf of said minors against said C. J. Smith, receiver.

Dated April 15, 1896.

MARY AGNES RYAN,
Petitioner.

Order Appointing Guardian ad Litem.

On reading and filing the foregoing petition, and hearing testimony in relation thereto, it is hereby ordered that the petitioner herein, Mary Agnes Ryan, be, and she is hereby appointed guardian ad litem to appear and prosecute in behalf of said minors Charles Ryan, Jr., and Mary Ryan, said action against said C. J. Smith, receiver of the Oregon Improvement Company, a corporation.

Dated April 16th, 1896.

JOSEPH McKENNA,
Judge.

[Endorsed]: Filed April 17, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

MARY AGNES RYAN and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by their Guardian ad litem, MARY AGNES RYAN,

Plaintiffs,

vs.

C. J. SMITH, as Receiver of the Oregon Improvement Company, a Corporation,

Defendant.

Complaint.

Plaintiffs complain of defendant, and for cause of action allege:

I.

That the plaintiffs, Charles Ryan, Jr., and Mary Ryan, are minors of the age of four and two years, respectively.

That on the 16th day of April, 1896, at the city and county of San Francisco, State of California, the above-named Mary Agnes Ryan was by an order of the Circuit Court of the United States, in and for the Ninth Circuit, Northern District of California, duly appointed guardian

ad litem of the plaintiffs Charles Ryan, Jr., and Mary Ryan, to appear for and represent them in this action.

II.

That the Oregon Improvement Company is, and was at all times mentioned herein, a corporation organized and existing under and by virtue of the laws of the State of Oregon.

III.

That on the 7th day of October, 1895, and for a long time prior thereto, the said Oregon Improvement Company was the owner of and operated and controlled a system of railroads, steamships, and other vessels, and owned and operated coal mines situate in the States of California, Oregon and Washington.

That on said date, in a certain action entitled, The Farmers Loan and Trust Company, complainant, versus The Oregon Improvement Company, a corporation, defendant, theretofore commenced and then pending in the United States Circuit Court, Ninth Circuit, Northern District of California, the defendant C. J. Smith was by order of said Circuit Court duly given and made on said date duly appointed receiver of all the property of said Oregon Improvement Company, a corporation, real, personal, and mixed, of whatever kind and description, and wheresoever situated, including all equipments, locomotives, cars, and other rolling stock, boats, steamships, ships, docks, piers, floats, lands, mines, machinery, boat

materials, shops, coalyards, fixtures, coal, merchandise, and supplies then owned, held, or in possession of or in the use of said Oregon Improvement Company, and including all rights of way, tracks, terminal facilities, real estate, and all other property of every kind and nature held or possessed by the said corporation, together with all moneys, books of account, contracts of every kind, debts, things in action, bonds, stocks, securities, deeds, leases, leasehold interests, beneficial interests and muniments of title, bills receivable, rents, profits, and income of premises accrued and to accrue, as well as all franchises, rights, easements, and appurtenances of said corporation. And said receiver was by the terms of said order authorized, empowered, and directed to take immediate possession of all and singular the property above described or referred to, wherever situated or found, and continue the operation of said railroad system, and to run and operate the said railroads, and such other railroads as said corporation owned under leases, or otherwise, and had heretofore run and operated, and to continue the operation of said coal mines and said steamboats, boats, and vessels and to conduct systematically the business of a common carrier of passengers and freight, whether on land or water, as well as of mining and selling coal, and to discharge all of the public duties obligatory upon the defendant, and to preserve the said property in proper condition and repair, and to protect the title and possession thereof, and to employ such persons and make such payments and disbursements as may be needful or proper in so doing.

That said receiver thereafter, and on said 7th day of

October, 1895, duly qualified and entered on the discharge of his duties as receiver of said corporation, and ever since said date has continued to be, and now is, such receiver, and engaged in the performance of the duties appertaining thereto.

That thereafter, and on the 6th day of March, 1896, in a certain action theretofore commenced and then pending in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, The Farmers' Loan and Trust Company, a corporation, complainant, vs. Oregon Improvement Company, a corporation, and C. J. Smith, as receiver, defendants, an order was duly given and made by said Circuit Court extending the receivership hereinabove set forth to said latter suit, and reappointing said C. J. Smith receiver of said corporation, with like powers and duties as he had been granted by said former order. That thereafter, on the 7th day of March, 1896, said C. J. Smith duly qualified and entered upon the duties of such receivership, and has since continued and is now performing the same.

IV.

That heretofore, to-wit, on the 13th day of March, 1896, one Charles Ryan was employed by said defendant in his capacity of receiver of said corporation, and was engaged under the direction of said receiver in assisting unloading coal from a certain vessel known and called the bark "Empire," then and there in the possession and use of said receiver in the city and county of San Francisco, State of California. That the duties which said Charles

Ryan was engaged in performing on said date were more particularly the duties of "dumper," and he was required, in the performance of those duties, to stand upon a platform on said vessel "Empire," and when a large tub or bucket containing coal was hoisted to take hold of the "tail," or rope attached t osaid tub and dump it. That said defendant negligently failed to furnish said tub with a "tail" of sufficient strength for the purpose for which it was used, so that when said Charles Ryan took hold of the same on said day, in the usual and ordinary manner, the said "tail" broke and gave way, and by reason thereof the said Charles Ryan was caused to fall, and was precipitated down an open hatchway on said vessel a distance of forty--five feet, or thereabouts, and received injuries from which he died on the same day. That said Charles Ryan received said injuries resulting in his death as aforesaid, solely by reason of the negligence of said defendant in providing and furnishing an unsafe and insecure "tail" to said tub.

V.

That said Charles Ryan left surviving him his wife, the said plaintiff, Mary Agnes Ryan, and two children, the said Charles Ryan, Jr., and said Mary Ryan, both of whom are the issue of the marriage of said Charles Ryan and Mary Agnes Ryan.

VI.

That the plaintiffs are the only heirs of the said Charles Ryan, and were wholly dependent upon him for

their support, maintenance, protection. nurture, and education.

VII.

That by reason of the death of the said Charles Ryan, so caused by the negligence of the said defendant as aforesaid, said plaintiffs have been deprived of the support, maintenance, protection, nurture and education, and also of the comfort, society and companionship of said Charles Ryan.

VIII.

That plaintiffs by reason of the premises have been damaged in the sum of thirty thousand dollars.

Wherefore, the plaintiffs pray judgment against said defendant for said sum of thirty thousand dollars, and costs of suit.

REDDY, CAMPBELL & METSON,
Attorneys for Plaintiffs.

United States of America,
Northern District of California.
City and County of San Francisco. } ss.

Mary Agnes Ryan, being duly sworn, deposes and says, that she is one of the plaintiffs in the foregoing action, that she has read the foregoing complaint and knows the contents thereof, and that the same is true of her own knowledge, except as to those matters which

are therein stated on her information and belief, and that as to those matters, she believes it to be true.

MARY AGNES RYAN.

Subscribed and sworn to before me this 16 day of April, 1896.

[Seal] HOLLAND SMITH,

Notary Public in and for the City and County of San Francisco.

[Endorsed]: Filed April 17th, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

MARY AGNES RYAN and CHARLES RYAN JR., a Minor, and MARY RYAN, a Minor, by their Guardian ad litem, MARY AGNES RYAN,

Plaintiffs.

vs.

C. J. SMITH, as Receiver of the Oregon Improvement Company, a Corporation,

Defendant.

Action brought in the said Circuit Court, and the Complaint filed in the office of the Clerk of said Circuit Court, in the City and County of San Francisco.

Summons.

The President of the United States of America, Greeting, to C. J. Smith, Defendant.

You are hereby required to appear in an action brought against you by the above-named plaintiff, in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, and to file your plea, answer, or demurrer, to the complaint filed therein (a certified copy of which accompanies this summons), in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on

you of this summons, if served in this county; or if served out of this county, then within thirty days, or judgment by default will be taken against you.

The said action is brought to obtain judgment against you for the sum of thirty thousand dollars damages for the death of one Charles Ryan, alleged in the complaint to have been caused on March 13th, 1896, by the negligence of the defendant while said Charles Ryan was in the employ of the defendant in the city and county of San Francisco, State of California, and engaged in working under the direction of said receiver on a certain vessel known and called the bark "Empire." It being alleged in the complaint that the plaintiff, Mary Agnes Ryan, is the surviving wife of said deceased, and that Charles Ryan, Jr., and Mary Ryan are minor children of said deceased and said Mary Agnes Ryan, and his only other heirs at law, and if you fail to appear and plead, answer, or demur, as herein required, your default will be entered and the plaintiff will apply to the Court for the relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, this 17th day of April, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the 120th.

W. J. COSTIGAN, Clerk.

[Seal] By W. B. Beaizley, Deputy Clerk.

[Endorsed]: United States Marshal's Office.
Northern District of California.

I hereby certify that I received the within writ on the

18 day of April, 1896, and personally served the same on the 18 day of April, 1896, by delivering to, and leaving with, John L. Howard, manager of Oregon Improvement Co., under instructions from plaintiffs' attorneys, said defendant named therein, personally, at the city and county of San Francisco in said district, a certified copy thereof, together with a copy of the complaint certified to by attached thereto.

San Francisco, June 2nd, 1896.

BARRY BALDWIN,
U. S. Marshal.
By T. J. Gallagher, Deputy.

[Endorsed]: Filed June 2d, 1896. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

MARY AGNES RYAN, and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by their Guardian ad litem, MARY AGNES RYAN,

Plaintiffs,

vs.

C. J. SMITH, as Receiver of the Oregon Improvement Company, a Corporation.

Defendant.

Answer.

I.

The defendant answering the complaint, denies that he negligently, or at all, failed to furnish the tub mentioned in the complaint with a tail of sufficient strength for the purpose for which it was used, or that the Charles Ryan mentioned in the complaint received the injuries mentioned in the complaint solely or at all by reason of the negligence of defendant in providing or furnishing an unsafe or insecure tail to said tub, or by reason of any negligence of defendant whatever, or that

defendant provided or furnished an unsafe or insecure tail to said tub.

II.

And for a further and separate answer, the defendant says that said Charles Ryan received the injuries mentioned in the complaint by reason of his own negligence directly and proximately contributing to and causing such injuries.

Wherefore, defendant prays to be hence dismissed with his costs.

SIDNEY V. SMITH,
Attorney for Defendant.

State of California,
City and County of San Francisco. } ss.

Sidney V. Smith, being duly sworn, deposes and says, that he is the attorney for the defendant C. J. Smith, as receiver of the Oregon Improvement Company, in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to such matters that he believes it to be true.

That the reason why this verification is made by said Sidney V. Smith, and not by said defendant C. J. Smith, is that the said C. J. Smith is now absent from the State of California.

SIDNEY V. SMITH.

Subscribed and sworn to before me this 7th day of May, 1896.

[Seal] THOS. E. HAVEN,

Notary Public, in and for the City and County of San Francisco, State of California.

Service of a copy of the within answer is hereby admitted this 7th day of May, 1896.

REDDY, CAMPBELL & METSON,

Attorneys for Plaintiffs.

[Endorsed]: Filed May 7, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clerk.

UNITED STATES OF AMERICA.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

MARY AGNES RYAN, et al.,
Plaintiffs,
vs.
C. J. SMITH, as Receiver of the Oregon Improvement Company, a Corporation.
Defendant.
} No. 12199.

Verdict.

We, the jury, find in favor of the defendant.

ROBERT HAIGHT,
Foreman.

[Endorsed]: Filed January 8, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

MARY AGNES RYAN and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by their Guardian ad litem, MARY AGNES RYAN,
Plaintiffs,
vs.
C. J. SMITH, as Receiver of the Oregon Improvement Company, a Corporation,
Defendant.
No. 12199.

Judgment on Verdict.

This cause came on regularly for trial. The said parties appeared by their attorneys. A jury of twelve persons was regularly impaneled and sworn to try said cause. Witnesses on the part of plaintiffs and defendant were sworn and examined. After hearing the evidence, arguments of counsel, and instructions of the Court, the jury retired to deliberate upon a verdict and subsequently returned into court, and being called all answered to their names and presented the following verdict: "We, the jury, find in favor of the defendant. Robert Haight, Foreman."

Wherefore, by virtue of the law, and by reason of the

premises aforesaid, it is ordered, adjudged, and decreed, that said C. J. Smith, as receiver of the Oregon Improvement Company, a corporation, defendant, have and recover from said Mary Agnes Ryan and Charles Ryan, Jr., and Mary Ryan, minors, and Mary Agnes Ryan, as guardian ad litem of said Charles Ryan, Jr., and Mary Ryan, minors, plaintiffs herein, his costs and disbursements incurred in this action, amounting to the sum of $

Entered this 8th day of January, A. D. 1897.

W. J. COSTIGAN, Clerk.

A true copy. Attest:

W. J. COSTIGAN, Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

MARY AGNES RYAN, et al.,
vs.
C. J. SMITH, as Receiver, etc. } No. 12199.

Certificate to Judgment Roll.

I, W. J. Costigan, clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said Circuit Court this 8th day of January, 1897.

[Seal] W. J. COSTIGAN, Clerk.
By W. B. Beaizley, Deputy Clerk.

[Endorsed]: Judgment roll. Filed January 8th, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

MARY AGNES RYAN, et al.,
Plaintiffs.
vs.
C. J. SMITH, Receiver, etc.,
Defendant.

Bill of Exceptions.

Be it remembered that the above-entitled action came on regularly for trial upon the 7th day of January, 1897, in the above-entitled court, before a jury duly impaneled and sworn to try said cause, plaintiffs appearing by Messrs. Reddy, Campbell & Metson, and the defendant appearing by Sidney V. Smith, Esq., whereupon the following proceedings and none other were had:

CHARLES PAULSEN, a witness sworn on behalf of plaintiffs, testified as follows:

I am an engineer, working for the Oregon Improvement Company, and have been working for that company about thirteen years. I was subpoenaed by the plaintiffs in this action and was asked to give a statement of my testimony to them, but I did not have time to go to their office this morning. I was at the office of counsel for the defendant this morning. I am still in the employ of the Oregon Improvement Company; Mr. Withington is superintendent. I knew Charles Ryan about eight or nine years before his death, and remember the day of the accident to him. I had charge of the donkey engine, and was hoisting coal out of the bark "Empire" off shore on board of the schooner. It was hoisted by the usual means, by a single stationary fall in iron buckets; the fall is attached to the bucket, and each bucket has two tail ropes attached to the side; these tails are attached by splicing the eye in the rope. There is an eye, and then an iron baggot on the side. The fall is spliced and the eye is put through the baggot, and the end of the rope is drove through the eye of the rope, and made fast. These tails were attached to the bucket in this way on the day Mr. Ryan was killed. Mr. Ryan fell down, as soon as the fall gave way. The splice pulled out from the bucket. After the rope gave way, I went on board the schooner and picked up the rope, and Bob Hitchins, the foreman of the coal shops, and I took the rope to the office of the Oregon Improvement Company and left it there.

Mr. CAMPBELL.—I should like that rope produced, if your Honor please.

Mr. SMITH.—There it is (producing.)

(The witness then proceeded to testify:) This is the

rope that I picked up that morning on board the schooner. This is all the rope there was. The rope came loose in that bucket by the splice pulling out.

(The rope was thereupon introduced in evidence, and marked "Plaintiffs' Exhibit A.")

(The witness then proceeded to testify:) We had been taking coal from that vessel two or three days. Mr. Hitchins erected the rigging with which the coal was taken out. He is the foreman of the coal department. I do not recollect where Ryan was when that was erected. Mr. Ryan had not been working there in that capacity until the morning that he was killed. He had been tending hatch a while previous to that morning. A hatch-tender has got to look out and give the signal to the engineer when the tub has got to go up, or when we lower it. That is the hatch-tender's duty. He gives the signal how to manage the donkey engine, to lift the buckets up. He had not been acting in the capacity of dumper until that morning for perhaps two weeks previous to that. We went to work at seven o'clock that morning, and the accident occurred about ten o'clock. I saw the man fall. When the tub came up he got hold of the bucket the same as usual with his left hand on the tail, and pulled the trigger, the catch, on the top, to dump it. At the same time he dumped the tub. I saw him fall backwards and sideways. He fell with his left hand on the chute, his left arm stretched over the chute like that (illustrating.) At the same moment I saw his feet sliding off the stage, and he fell down into the ship's hold, feet foremost, a distance of about thirty feet. I did not go down into the hold after he fell but saw him brought out in three or

four minutes. He was dead. I saw this rope that had pulled out about ten minutes after he fell on board the schooner. I did not see whether the rope dropped when he fell. The tail was missing from the tub. Mr. Hitchins and I went to look for the rope after the man was brought up. Hitchins went down to the ship's hold and I looked over the rail of the ship, and I saw the tail lying right on the top of the coal. Mr. Ryan had worked for the Oregon Improvement Company about eight or nine, steadily. He was a strong, healthy, and able-bodied man to all appearances

(It is here admitted that the rope in evidence was the tail on the bucket which gave way and caused the accident.)

Cross-Examination.

I have been an engineer for the last ten years. I was a common laborer before that. Then I took the fire-room and after a couple of months I took the hoister. I have been a sailor before the mast and followed the sea. The ship "Empire" at the time of the accident lay along the wharf and the schooner into which the coal was being dumped was lying on the outside. The "Empire" laid between the wharf and the schooner. The structure on which Ryan stood at the time of the accident was a staging, consisting of two wooden horses, and on the top of these wooden horses there is a timber 12 by 12, and a 12-inch plank, 3 by 12, lying alongside. On these timbers the chute rests. O nthis same staging, 12 by 12, and 4

by 12, a man stands and dumps. The structure was over the hatch of the "Empire" from which the coal was being taken. These horses are about 16 feet high and were fore and aft the chute. I have with me a tail that is ordinarily used. (Witness produces a rope.) It was taken from one of the tubs belonging to the Oregon Improvement Company this morning; at one end is the loop of which I spoke and it reaves through the baggot, the loop goes through. The rope is spliced; it is done by taking the rope apart and having about six inches of ends, and tucking it one under each other. You open the twist of the rope and shove the ends through and draw the rope taut again. That makes a tight splice, and the harder you pull on it the tighter it gets. The difference between a rope so spliced and the one put in evidence is that the one put in evidence was undoubtedly put in in the same way as this one is, but the knot coming loose, instead of splicing it some one had tampered with it and plaited it.

Exhibit "A" in this case was made by plaiting and not by splicing. In my opinion, that would not make as tight a job as the splice, and that kind of a job would not hold. A man that knows anything about the sea ought to see the difference in the ropes at first glance. The defect is, that it was braided instead of spliced. There is not much of a pull on these ropes; not more than a man pulls with one hand. The tails are there simply to steady the tub, to hold it in position while it is upset.

Q. Now, in the course of this business, whose duty is it to fix those tails?

Mr. CAMPBELL.—I object to the question as incompetent, irrelevant, immaterial, and a question of law. The la wmakes it the duty of the employer, unless they propose to show that this man was ordered to do it. This man had been there for two hours. It is the duty of the employer to furnish safe appliances with which the people are to work. He cannot shift that responsibility by asking any person to do it. That is the settled law. And my further objection is that it is not cross-examination.

The COURT.—You introduced this tail and the way it was fixed on the tub. Is it not proper cross-examination to ascertain who put it on.

Mr. CAMPBELL.—If he knows who put it on, all right, I don't object to that. There is a difference between who put it on, and whose duty it is to put it on.

The COURT.—I overrule the objection. I will be able to control this matter.

Mr. CAMPBELL.—We will take an exception.

Mr. SMITH.—Q. Answer yes or no to that question, whether you know or do not know.

A. I do not know whose duty it is.

Mr. SMITH.—Q. Do you know who in the course of that business usually attaches or puts the tails on the tubs?

Mr. CAMPBELL.—I object to the question on the same grounds as incompetent.

The COURT.—I overrule the objection.

Mr. CAMPBELL.—We take an exception.

A. The dumper always as long as I have seen.

The COURT.—The question is, do you know whose duty it is ordinarily?

Mr. CAMPBELL.—Same objection.

The COURT.—The objection is overruled.

Mr. CAMPBELL.—We take an exception.

A. I know who ordinarily used to do it.

Q. Who ordinarily attaches the tail to the tub?

A. Yes, sir.

Q. Who does?

A. The dumper always did it, as long as I have been working for the company.

Mr. CAMPBELL.—It is understood that this is all under my objection and exception.

The COURT.—Yes.

Mr. CAMPBELL.—I move to strike it out on the ground that it does not connect this deceased with it, and does not in any way relieve them from their liability to have it done properly.

The COURT.—Motion to strike out denied.

Mr. CAMPBELL.—We take an exception.

Mr. SMITH.—Q. Do you know whether or not Ryan was in the habit of attending to the tails on the tubs on which he worked?

Mr. CAMPBELL.—I object to the question, first, because it is not cross-examination, and it is what he was in the habit of doing.

The COURT.—I think I will allow it.

Mr. CAMPBELL.—We will take an exception.

Mr. SMITH.—Q. You said on direct examination that Ryan had not acted as dumper for two weeks.

A. About two weeks.

(The witness continued to testify:) He had been dumper before that time for about two years, perhaps a little more or less, in the employment of the Oregon Improvement Company. The company provides ropes for making tails. They are kept in No. 1 Engine House. The men all take them when they want them. When they want a rope they go and get it themselves.

Redirect Examination.

I do not know whether the rope was properly attached to the bucket in the first place or not, or rather the knot in the rope marked Exhibit "A" must have undone and the rope unlaid. I have been ten years in that business, and a proper rope properly attached to a bucket will not come off, and if the rope did come off it was either not a proper rope or was not properly attached to it.

(Mr. Smith thereupon introduced in evidence the second rope, and it was marked "Defendant's Exhibit 1.")

(The witness continued to testify:) The eye that I speak of is the baggot here. The baggot is a little thing about the size of that (illustrating.) The baggot is made of about half-inch iron. The rope is put through the baggot, and we shove it through the eye, then we pull it. You could see that the rope marked Exhibit "A" was not properly laid; no splice would hold when a rope is braid-

ed like that. That rope was not a proper rope in the condition it was to put on the bucket. Mr. Ryan had been at work about three hours that morning. The buckets hold about 800 or 850 pounds of coal, and the buckets themselves weigh about 300 or 400 pounds; the bucket and coal would be about 1,000 pounds at any rate. There is a man on each side; each man has hold of a tail. They use the tails to steady the bucket. Sometimes they pull a little, but very seldom there is any hard pulling, but this depends upon the way the bucket comes up whether they have to pull more or less and the condition of the bucket. The buckets do not always come up in the same condition; sometimes they dump much lighter than others.

JAMES McLESTER, a witness, sworn on behalf of plaintiffs, testified as follows:

I worked for the Oregon Improvement Company, and have worked there about five or six years. I knew Mr. Ryan in his lifetime. My duties there are general dumping and helping to dump. On the morning of the accident I was helping Ryan. I was on the other side of the bucket with him, and saw the accident. I went down that morning, on the morning of the 13th of March, if I remember rightly, but had not been working the day before. I do not think Ryan had been working the day before. Mr. Ryan had been working about two or three weeks previous to that tending hatch. When the bucket came up

we both reached out and caught it and pulled in on it. I saw him fall. He pulled in and he fell down. I noticed then that the tail was gone off the side he was on. He fell down into the hold. We had not a hard pull. We had a good staging, and sometimes you have to pull harder than others. We had not a hard pull that morning, and the tail came off very easily. I don't know how it was attached. I don't believe it was properly attached or it would not have come off so easily, assuming that the rope was proper. The rope that gave way was the same rope that was found on the bucket when we went to work that morning, and was furnished by the Oregon Improvement Company, or its receiver, for that purpose. We used it just as we had used it before. I suppose about 250 buckets had come up that morning before the accident happened. There were four buckets used. It takes about six or seven seconds to dump a bucket. We did not have time to examine the rope when a bucket would come up. You might possibly see it, but you dump them just as quick as you can. As soon as the bucket comes up we are supposed to grab the rope and swing it in just as quickly as we can.

EDWARD McSHANE, a witness sworn on behalf of plaintiffs, testified as follows:

I was employed in the hold of the vessel on the morning of the accident and was engaged in filling the tubs. I

saw the accident. I saw Charles Ryan fall down. I saw him after he fell and he was dead.

Mr. SMITH.—We raise no question about the mode of this man's death. The only question we raise is as to the cause.

MARY AGNES RYAN, a witness sworn on behalf of plaintiffs, testified as follows:

I am one of the plaintiffs in this action. Charles Ryan, the deceased, was my husband. I was married to him on the 25th of June, 1891, at St. Dominic's Church, San Francisco. Mr. Ryan was 29 years and four months of age at the time of his death. We had two children the issue of that marriage, Charles Ryan, aged 4 years, and Mary Ryan, aged one year and ten months at the time of his death. I have no other means of support than that derived from the labor of Mr. Ryan. His average earnings were between $60 and $65 a month—that would be his yearly average.

It was here admitted that by computation based upon the American table of mortality that the expectancy of life of a man of 30 years is 35 years.

Plaintiffs here rested.

Defendant moved the Court to direct the jury to render a verdict for the defendant, and, after argument of counsel, the motion was denied.

Defendant thereupon proceeded to introduce testimony as follows:

J. R. HICHENS, a witness sworn on behalf of defendant, testified as follows.

I am foreman of the stevedores in unloading coal for the Oregon Improvement Company. The business of the Oregon Improvement Company is carried on at Beale street wharf in this city. I have been foreman there about three years. Before that I was tending hatch. I had dumped, and had done pretty nearly everything there is to do about the dock. I acted as dumper between two and three years and am familiar with the custom of that business in regard to the duties of dumpers.

Q. State what is the custom of the men in regard to mending, repairing, or attending to the tails on the tubs.

Mr. CAMPBELL.—I object to the question upon the ground that it is irrelevant, immaterial, and incompetent, and you cannot violate an express provision of law by any custom, and it does not in any way affect the decedent.

The Court.—The objection is overruled.

Mr. CAMPBELL.—We take an exception.

(The witness then proceeded to testify:) It is the custom for the dumper always to look after the tail of the tubs. It always has been as long as I have been there. I knew Mr. Ryan as long as he had been working there, about seven or eight years. He was a dumper at one time for about three years.

Q. Did you ever see him repairing or arranging the tail of his tubs?

Mr. CAMPBELL.—I object to that as incompetent, irrelevant, and immaterial.

The COURT.—I overrule the objection.

Mr. CAMPBELL.—I will take an exception.

A. Yes, sir.

(The witness then proceeded to testify:) I have seen him splice the rope and put them in the tub himself. I recognize the rope marked Plaintiffs' Exhibit "A" as the rope found upon the dump after the accident to Ryan. I have not been in the habit of splicing ropes for these tubs. I have followed the sea and know how ropes are spliced.

Q. Do you know how that rope was spliced?

A. I know that the rope was spliced right in the first place.

Mr. CAMPBELL.—I move to strike that out. He must testify to facts. How does he know? He might be asked if he saw the rope on that concern, or saw the splice.

The COURT.—He says he knows. I overrule the objection.

Mr. CAMPBELL.—I will take an exception.

(The witness continued to testify:) I do not know how it was spliced at the time of the accident. I could not know that; the rope is braided.

Q. Was the splice made in a braid or in a twist of the rope?

Mr. CAMPBELL.—I object to the question because he says he does not know. I do not want this man's opinion.

The COURT.—I overrule the objection.

Mr. CAMPBELL.—I will take an exception.

A. The rope was spliced right in the first place, but when they braided it up it loosened the strands of the rope and that loosened the tucking of the rope, and the strain on it pulled it out.

(The witness continued:) In my opinion that was a proper way to splice the rope when it was originally spliced. It was not right when it pulled out of the tub, I know that.

Q. Was or was not that an obvious defect?

Mr. CAMPBELL.—I object to that. Let him state if he knows how it was fastened onto the tub, and how the splice was fixed. It is for the jury to determine whether it was an obvious defect. This man did not see it. How can he tell? He says it was put on correctly first, and afterwards pulled out. How can he tell when he did not see it whether that pulling was obvious to the eye?

The COURT.—I overrule the objection.

Mr. CAMPBELL.—I will take an exception.

A. Yes, sir; it is obvious to anybody who understands anything about a rope.

Cross-Examination

The splice was put on correctly at first. I know that because every man down there knew how to put them on.

That is the only reason I have for saying it was put on right in the first place. I never inspected them, but have seen them lots of times. It was not my place as foreman to inspect these things. I never looked at them at all. My only reason for saying that it was put in correctly at first was because I believe every man down there knew how to put on a splice, and I have seen them put on. I have seen them on the tub. I never examined them. I never examined this rope. It was not my place to examine it.

Q. I want you to tell the jury now how you know that that was spliced properly in the first place.

A. Yes, sir, that was spliced properly ,because the tail always hangs up on the rung right where the dumper always sees them. There is a set of tubs for each gang. This set of tubs is the tubs they always use in that hatch. This man had no other hatch to dump in but that. That was his regular hatch. When that hatch was working he used the same tubs. He always kept these tails hanging up, made them himself and hung them up on the outside of the engine-house. When he wanted a tail he got one and put it in a tub.

Mr. CAMPBELL.— Imove to strike out all this man's speech, and all his testimony, as not responsive.

The COURT.—Motion denied.

Mr. CAMPBELL.—We take an exception.

The man I was talking about is Charles Ryan. I sup-

pose he put that splice on because it was on his tub and there was no one else to put the splice there. I know as a matter of fact that he had not done any dumping for two weeks. I could not swear that he put it on himself. There was no one else to put it on but him. There were other dumpers there, but that rope had been on there for two weeks, I am positive of that by the looks of the rope. That rope was taken over to the office, but I don't know who cared for it since. I know that that rope was not put on on the morning before because I know that no one who knew anything about a rope would put on a rope like that on a tub. Mr. Ryan knew all about ropes. I do not say that he put it on that morning, but suppose he put it on. I would not swear he put it on. All I say is he was the man who put the tails on his tubs. McLester was dumping with him. It was the duty of all the dumpers to look after their particular tubs. There were four tubs with that gang and there were two dumpers. There is only one dumper in shore, but they put on two dumpers off shore. It was not possible to make a tight tail with that rope. We could not make a tight tail. You could not possibly do it. Mr. Ryan was a dumper of years of experience and understood rope, and he knew how to put a tail on, and if this was put on in this way and had been on for more than two weeks, it had not come off before that morning. I know how it was fastened on the bucket.

Q. If you never saw it, how can you tell the jury it was fastened on to the bucket?

A. I can only say I knew how it was ordinarily put on. I canonly tell how I supposed it drew out.

Q. Did you ever see it on that bucket?

A. I saw it on the bucket that morning. I did not examine it. I looked at the bucket once in a while while it was coming up through the hatch. I have been engaged in that business two or three years. I followed the sea 15 years and am perfectly familiar with the ropes. I did not watch that rope on the bucket at all. I say it was my duty to go along the decks, to look after the stevedores.

I saw the tubs always going up and down. I did not pay any attention to the tails. That was not my business. It takes about two seconds to dump a tub; then it goes right down again. I have followed the sea 15 years, and saw this bucket and saw nothing the matter with the tail, because the tub goes up so quick. If I had seen anything the matter with the tail it was not my duty to call their attention to it. I would have called their attention to it if I had seen it. I would not want any perso nto get hurt. I would probably call his attention to it and get him a new tail if he had asked me for it. It was not my business to have new tails put on. I would not have said anything about a new one unless he told me of it, but if I had seen the rope was wrong, improperly spliced so that it would draw out, I would have called his attention to the fact and directed him to get a new one. I was superintending the stevedores that morning. A dumper is not a stevedore. I was

not looking after dumpers. I was not looking after the tubs. I was superintending the stevedores. I stated a moment ago that I saw the tubs going up and down. I could not do anything there when I was walking around the decks. I can tell the jury how the tail was put on this tub. It was spliced the same as Defend ant's Exhibit No. 1. It was tucked through and probably came adrift. There was always rope yarn tied around the end, which probably came off and the rope unlaid. Somebody went to work and braided it up. When they braided it up they braided it up to the tucking, these ends that were tucked through there, the same as this. There is a whip, a piece of rope yarn, ties around the end to keep it from unlaying. The whipping came off of the rope, unlaid, and of course then that loosened the tucking in the splice, and it must have been a long time or else it could not have worked out, a steady strain on it all the time. It was put on the same as the other one Defendant's Exhibit No. 1.

Q. The other you are talking about is all your supposition, your theory. You did not see it unloose?

A. No, sir.

(The witness continued to testify:) I saw the tubs going up and down, and I got hold of this rope about ten minutes after the accident. When Charles Paulsen went down and got it we took it over to the coal office. I could not tell you how long it was there. They asked for the tail and we hunted for it and got it. I could

not swear that the tail was in the condition it now is when it was on the tub. It was plaited when on the tub. I knew that was not the way they were always put on. It was dangerous the way it is now. It was dangerous the way it was plaited as I saw it, in the way the tubs were going up and down. It was dangerous to be plaited. It was plaited when it was on the tub. I did not intend to say that. I could not swear that it was plaited when it was on the tub. If I said it was plaited when on the tub, that was something I could not say. I could not tell whether it was plaited when on the tub. It is not possible that a good splice could be made out of that rope which was plaited. They had been using these particular tubs for years. They were using them nearly every day, and still I say that I can tell from the rope, Exhibit "A," that it was on that bucket more than two weeks, and the only way that I can account for the rope coming off was that it must have got loose and some one plaited it up. You cannot make a good tail out of plaited rope. The rope did not break. The ends are not all the same because it is unlaid now. I say the rope did not break. The end of the rope is cut because you always cut it when you splice it. That end was cut to splice the rope. The splice is a cut. I would not say any more. The dumpers always fixed the tails. They did not have to come to me to get a new one. I gave no orders in any respect at all. The dumpers were employed by the hour. Mr. Ryan did not work regularly. He worked when-

ever we had work for him. He was employed at 7 o'clock that morning, and about 10 o'clock was injured, and he had worked about three hours. He had not been working as a dumper for about two weeks previous to that, and when he went to work that morning as dumper this rope was on the tub. I could not say as to what it's condition was then. I do not know how the rope was on that particular day. I don't know whether it was plaited or not. I only know they were all spliced in the same way and always put on in the same way. I cannot tell you anything more about this particular splice or this particular rope, only that they were always put on in the same way. I cannot tell you whether or not I took particular notice of that particular splice in that rope to know the condition it was in that morning. I did not examine the rope that morning. When I say there was a defect that could be seen by the eye, an obvious defect, I do not know anything more about it than that I saw the rope when it came up. It could not be anything but a defect in the way the rope was braided. I saw the tubs going up but they go up so quick a man has only two seconds at the top to dump the tub. I could not swear as to the condition of the rope that morning. I don't know its condition, the day before, nor the condition of the splice, nor its condition the day before that, nor the day before that, because I did not see it and did not notice it. I don't know whether it was spliced or whether it was plaited. I don't know anything, except the condition of the rope after I saw it.

Redirect Examination.

The rope is very nearly in the same condition as when I saw it, only a little more plaited up. I gave it to Mr. Graham, the assistant manager.

(It is here admitted that there was no change in the rope after it was placed in the hands of Mr. Smith, attorney for defendant.)

The defendant thereupon rested his case.

Be it further remembered, that after the arguments of counsel for plaintiffs and defendant, the Court gave the following instructions to the jury:

"Gentlemen of the Jury: It now devolves upon the Court to instruct you as to the law involved in this case. The law you will take from the Court. The determination of the facts is a matter wholly within your province. Therefore, in commenting, as I may, on some of the testimony in the case, you will understand I do not propose to usurp the functions of the jury in passing upon the facts. It will be merely for the purpose of calling your attention specifically to the questions of law applicable to such facts.

This is an action brought by Mary Agnes Ryan, and Charles Ryan, Jr., a minor, and Mary Ryan, a minor, by their guardian ad litem, Mary Agnes Ryan, plaintiffs, against C. J. Smith, as receiver of the Oregon Improvement Company, a corporation, defendant. It is brought

to recover damages for the death and loss of the husband and father.

It is charged in the complaint that this death resulted from the negligence of the corporation. It is alleged that: The duties which said Charles Ryan was engaged in performing on the said date, namely, the 13th day of March, 1896, were more particularly the duties of dumper and he was required, in the performance of those duties, to stand upon a platform on said vessel "Empire," and when a large tub or bucket containing coal was hoisted to take hold of the tail or rope attached to said tub and dump it. That said defendant negligently failed to furnish said tub with a tail of sufficient strength for the purpose for which it was used, so that when said Charles Ryan took hold of the same on said day, in the usual and ordinary manner, the said tail broke and gave way, and by reason thereof the said Charles Ryan was caused to fall, and was precipitated down an open hatchway on said vessel a distance of forty-five feet, or thereabouts, and received injuries from which he died on the same day.

The answer in the case denies that the corporation was guilty of any negligence with respect to this appliance as operated by the employees of the corporation at this time. Testimony has been introduced tending to show that on the 13th day of March, Ryan was engaged as a dumper upon the platform that had been erected over the hatchway of the steamer "Empire." He had been

employed by this company for two years in the capacity of dumper, but for the two weeks preceding the day on which he was injured he had not been at work as a dumper. He had been engaged as a hatch-tender during a portion of the time immediately preceding the accident, but had not been engaged as a dumper for the two weeks preceding. On the morning of March 13, 1896, as the testimony tends to show, he was on this platform, and with another was engaged in receiving these tubs as they came up to the platform from the hold below, taking hold of the tub by this tail for the purpose of steadying it to a position where it could be dumped. The testimony tends to show there had been about two hundred of these buckets brought up during the three hours they had been at work, when Ryan took hold of the tail of the bucket or tub, and in his effort to steady it the tail gave way. The testimony of the witnesses Paulsen and Hichens is, that the rope unspliced, and gave way, and Ryan fell through the hatchway a distance of some thirty or forty feet and was killed.

That is the case that is made out by the plaintiff, and they claim on the facts of their case that they are entitled to recover.

What are the principles of law involved in such a case which you will apply to the testimony that has been introduced here?

It is the duty of the master to use ordinary care to furnish machinery and appliances reasonably safe and suit-

able for use of the servant, such as with reasonable care on the part of the servant can be used without danger, except such as is incident to the business in which such instrumentalities are employed. This duty is not absolute, but relative. It is measured by the nature and character of the employment, the location of the premises and their surroundings. There are employments that of themselves are necessarily dangerous, in connection with which no position can be made secure. In such case the law requires of the master that he shall use ordinary care that the dangers of the employment are not necessarily enlarged; that he shall take proper care to furnish such safeguards as are customarily employed in the performance of like hazardous service, so that the servant, exercising proper care, may render his service without exposure to dangers that are not within the obvious scope of the employment as usually carried on.

While it is the duty of the master to provide such appliances as are suitable and reasonably safe, that duty is one of ordinary care. The master is not required to supply the best or the safest or the newest appliances, but such as can, with reasonable care, be used without danger except such as is reasonably incident to the business. The master is not an insurer of the safety of the servant. He is bound, as is the servant, to exercise ordinary care; and with respect to safeguards when dangerous machinery is employed, the test of negligence is the

ordinary and prudent usage of the business—what safeguards are commonly adopted by those in like business.

While ordinarily it is the duty of the master to keep in repair the appliances with which the servant must work, still it is not the master's duty to repair defects arising in the daily use of the appliances for which proper and suitable materials are supplied by him, and which may be easily remedied by the servant without the help of skilled mechanics for their repair; if, therefore, you find in this case that the defendant kept on hand and furnished proper ropes for the making of tails for the tubs used by it, and which could be had by its employees upon application therefor, and if you find that the defective condition of the tail used by Ryan at the time of the accident was discoverable by him by the use of ordinary powers of observation and common prudence, I charge you that it was the duty of said Ryan to have applied for and obtained from the defendant a proper rope for the making of a new tail, or to have repaired the tail upon the tub himself, and that his failure and negligence to do so was contributory negligence on his part, by reason of which the plaintiffs in this action cannot recover.

It is the duty of the servant to use ordinary care to ascertain the danger attending the service in which he engages, and to protect himself against known dangers and such as can by ordinary care be ascertained. This duty is as imperative upon him as is the duty laid upon the master.

The servant of mature age and of experience is charged by the law with knowledge of obvious dangers, and of those things that arewithin common observation and are according to natural law.

I instruct you that it is the duty of an employee to see that machinery and appliances used by him are in ordinary repair, so far as can be done by the exercise of such care and prudence as should be exercised by an ordinarily careful and prudent man engaged in such business, and if you believe that Charles Ryan, the husband and father of the plaintiffs in this case, knew, or by the exercise of ordinary prudence and care should have known, the alleged defect in the tail of the tub used by him at the time of the accident and the danger arising from the defect, and continued his work without objection, then he assumed the risk and the plaintiffs cannot recover in this action. The servant on his part assumes the natural and ordinary risks attendant on his employment.

These instructions require some further comment with respect to a feature of the case that has been suggested by counsel, namely, that there are certain duties with respect to machinery and appliances that are imposed upon the master. In the law they are called positive duties, that is to say, there are certain duties in securing the safety of the employee that the master must positively perform with respect to the servant. There are certain appliances which he must see are in order, or take

precautions therefor, and he cannot absolve himself from this duty by giving the matter into the hands of a servant. If the servant fails to perform the duty which positively belongs to the master, still the master is liable.

The application of that principle of the law is illustrated in this way: Suppose it is the duty of the master to furnish a proper donkey engine to the servants who are engaged in unloading a vessel, one that is ordinarily safe and properly adjusted, and he furnishes an engine that is not in proper condition, one that is not safe, and the engine explodes, or is subjected to some accident by reason of apparent defect which injures one of the servants employed in the operation of the business. It is the positive duty of the master to supply the servants with a proper engine and machinery that is safe, and if he fails in that respect, the mere fact that the machinery was operated by an engineer would not make any difference. The master would still be responsible for his failure to furnish the proper sort of safe machinery. That is the rule that you are to apply in this case with respect to this matter, in the view that the master was required to furnish proper and safe appliances.

But, on the other hand, you will consider whether or not the duty of keeping this particular tail appliance in repair belonged to Mr. Ryan; whether it was the duty of Mr. Ryan to see that the tail was in order. While it may have been the duty of the master to furnish a safe appliance, still, if it was to be performed by Ryan, then

his negligence in the matter would of course not make the principal or master liable. I think I have made myself understood. If Mr. Ryan was to take care of these tails and see that they were in a safe condition, and when they became unsafe, he was to substitute new ones, and that that was his duty, then of course the master would not be responsible for this failure on his part whereby he was injured.

There is some testimony to the effect that the duty of keeping these tails in repair was upon Mr. Ryan. Mr. Hichens, who testified this morning, was asked the question, Are you familiar with the custom of that business—the business of hoisting tubs—in regard to the duties of dumpers, He answered "Yes, sir." Then further:

Q. State what is the custom of the men in regard to mending, repairing, or attending to the tails on the tubs.

A. It is the custom of the dumper always to look out for the tails of the tubs. It always has been as long as I have been there.

The same testimony was delivered yesterday. The witness Paulsen is asked: "Now, in the course of this business, whose duty is it to fix those tails?" The answer to that was: "The dumper, always as long as I have —when he was interrupted, after which he continued, "I know who ordinarily used to do it." Then, further:

Q. Who, ordinarily, attaches the tail to the tub?

A. Yes, sir.

Q. Who does?

A. The dumper always did it; as long as I have been working for the company.

Q. The dumper always does? A. Yes, sir.

Now, then, the dumpers were the servants working together in the handling of the tubs, so the testimony tends to show, and who knew of each other's work and labor, and had an opportunity to observe each other's conduct. They were fellow-servants in that respect. They would be fellow-servants in bringing the tub to its place on the platform where it was discharged, and in emptying it. They would be fellow-servants in that respect. But if one of these servants—Mr. Ryan, for instance—had the exclusive duty of keeping these tails in repair, a duty that belonged particularly to the master, and he should fail in that respect, his failure could not be that of a fellow-servant with respect to others. But you will observe in respect to this matter that to bring the principals into play in this case, you must find that some other servant handled this tail and kept it in repair and by reason of that fellow-servant's conduct, the tail became unfit for its use, or its attachment became imperfect. If that was the work of some other servant, not Mr. Ryan, and that person was acting as the agent of the master in putting the tail in that position, and in keeping it in repair, then of course the master would be responsible for his failure in that respect, and the plaintiffs would be entitled to recover in this case. But you will observe that the keeping of this tail in repair was a matter that

continued from time to time, and it was a matter that might be required to be performed on one day and another day, and on another tail. So that this keeping of the tail in repair, if you believe it was a continuous duty required to be performed by these servants engaged in this business from day to day, and was a matter in which they became fellow-servants, then the master was not responsible for their failure as fellow-servants to keep it in repair. It is only in the view that some fellow-servant is charged with that specific duty to the exclusion of the other, and in that respect represented the master, that the master would be held responsible for the conduct of the servant.

I instruct you that an employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of a culpable employee. If, therefore, you find in this action that the defective condition of the tail of the tub used by Ryan at the time of the accident was due to the carelessness or negligence of one of the fellow-servants or co-employees of the said Ryan, employed by the defendant in the same general business as the said Ryan, in failing or neglecting to keep the said tail in proper condition of repair, then I instruct you that the negligence of said fellow-servant or co-em-

ployee of said Ryan in that regard was not negligence upon the part of the defendant, and that the plaintiffs cannot recover in this action.

With respect to the other feature of the case, that is to say, the question whether or not this defect was obvious to Ryan.

Of course while he was employed in handling this tail, if this defect was obvious to him, if he could see it was defective and that therefore it was dangerous, then of course he assumed the responsibility and risk of the accident. But as urged by counsel, the defect must not only be obvious, but the danger of the defect must also be obvious to the servant in the handling of the tail. In other words, he must realize not only that that tail was defective, but that in handling it the work was dangerous. If it was obvious to Ryan that the tail was defective by reason of its appearance, or otherwise, and if it was obviously dangerous by reason of that defect, he assumed the risk when he continued in that employment. That is the natural, commonsense way of considering the position of persons employed about machinery or appliances. If they continue in the work, knowing the dangers to which they are exposed, knowing that the thing is defective and that there is danger—if they continue in that employment, the law determines that they assume the risk.

Mr. CAMPBELL.—The contrary is also true, is it not? I ask your Honor to charge that the contrary is law:

Unless the jury believe from the evidence that he did see it or know it, he is not responsible for that.

The COURT.—Yes, gentlemen of the jury, that is correct. If he did not see it, or notice that it was in a dangerous position, or that it was defective and by reason of its defect was in a dangerous position, he is not responsible; he did not assume the risk. That is the position. He did not assume the risk unless he knew of the danger.

Mr. SMITH.—Will your Honor allow me one suggestion. I think that that instruction ought to be qualified, that if in the opinion of the jury the imperfection was so obvious that he ought to have seen it, it should be considered.

The COURT.—I thought I had reached that point; I think I have given it. If it was so obvious as to be seen, the master would not be responsible.

Here is a form of verdict which I will hand to you, gentlemen of the jury, if you find for the plaintiffs, you will find as indicated, assessing the damages at whatever sum you may determine the plaintiffs in this case have suffered by reason of the death of Mr. Ryan, if you find for the defendant you will say, "We, the jury, find for the defendant."

The jury having retired to deliberate upon their verdict, subsequently and upon the same day returned into court, whereupon the following proceedings were had:

The CLERK.—Gentlemen of the jury, have you agreed upon a verdict?

The FOREMAN.—We have not. It is the unanimous opinion of the jury, your Honor, that it will be impossible for us to agree.

The COURT.—How do you stand? That is, how are you divided in numbers?

The FOREMAN.—We have varied from seven to five to nine to three. At present we stand seven to five.

The COURT.—Is the matter in controversy a question of fact, or a question of law?

The FOREMAN.—It is a question of law.

The COURT.—Then it is for the Court to advise you upon it.

The FOREMAN.—I might say that the question that the jury seemed to be most in doubt about are the question of neglect, the question of fellow-servants, and the responsibility of the company.

The COURT.—Very well. I will explain that to you again if you desire.

With respect to a fellow-servant, where persons are employed by a master, and where one person is so associated with another that that person can observe the conduct of the other and know what the other is doing—where they are so related in their business those servants are called in law fellow-servants, and the person who works with another or others assumes the risk of working with such others, because they can observe them and their conduct, and the master is not responsible, because one servant knows as well about the conduct of the other servants as the master himself if not better.

In this case, the question relates to this tail attached to this tub. The persons having to do with that tub were those servants or employees who handled it here at the wharf or vessel. The testimony tends to show that it was the duty of those who were engaged in dumping those tubs to see to it that the tails were kept in order. If that is true those people who were charged with that duty were fellow-servants, and the master was not responsible for the conduct of such persons, because one person could observe the conduct of another and know how the other acted, and know whether he attended to his duty or not. So I say that such persons would be considered as fellow-servants in such an employment.

I have said something to you about the duty of the master. It is sometimes the duty of the master to provide certain machinery and certain appliances and be responsible with respect to those things. It is the duty of the master to see that they are in order, and it is a positive duty which cannot be performed by a servant in such a way as to absolve the master from responsibility. But you must observe in such caseit is where one servant is injured by the failure of the master to provide some appliance or some machinery, but the master may have devolved upon a servant to provide those appliances. You can very well understand that. The master might say he would have a servant look after the machinery or provide ropes, and see that they wer e in order. That duty may be performed by the master through his servant, and if that servant fails to keep them in order and

is injured thereby, the representatives of such a servant cannot claim damages for his neglect to keep those things in order, although it is a matter which devolves upon the master primarily. In this case, if the master had made provision, or if there was a custom that these dumpers should keep these tails in order, then it might be said in one sense that that was the duty of the master. Nevertheless, if it was devolved, as it might very properly be devolved, upon the servant, and if he then failed to keep the appliance in order and suffered therefrom, he would have no recourse against the master, it would be his own fault.

In this case there was some testimony that it was Ryan's duty to keep these tails in order. If you believe the testimony that it was his duty to keep them in order, and that they hung up there in the engine-room where they could easily be obtained, then neither he nor his representatives could recover for any damages arising therefrom.

A master may devolve a duty upon more than one servant, as, for instance upon two or three dumpers. Then those men working together in that way and performing that duty are fellow-servants; they become fellow-servants even in such duty; that is to say, in keeping the apparatus in repair, and if there is a failure on the part of one of these servants to keep the appliance in order, then the master is not responsible for it. It is a duty in which the fellow-servant has assumed the responsibility of his fellow-servant's conduct.

Those are the instructions which I give you with respect to that.

Mr. FAIRALL.—If the Court please, I would like to have the jury instructed upon this point: that it is the duty of the master not only to furnish safe appliances, but that that duty is a continuing one; that it is his duty to see that at all times those appliances are kept in reasonably safe condition, and that he is bound to make a proper inspection of the appliances,and that if he fails to make that inspection, he is guilty of neglect; and, that where a defect would be apparent upon a reasonable inspection, and it is allowed to continue, it is presumed that no inspection is made, and the master is liable.

The COURT.—I have already instructed you, gentlemen, that the duty of the master with respect to certain matters, will be a continuingduty; but I have also instructed you that he may devolve that continuing duty upon a servant to perform, and that if that servant or any of his fellow-servants in working together fails in the performance of that duty, then the master is not responsible. The point is this: that the servant has in such case assumed the responsibility of working with his fellow-servants.

Be it further remembered that the plaintiff excepted to that portion of the Court's charge to the jury which reads as follows:

"While it is ordinarily the duty of the master to keep in repair the appliances with which the servant must

work, still it is not the master's duty to repair defects arising in the daily use of the appliance, for which proper and suitable materials are supplied by him, and which may be easily remedied by the servant without the help of skilled mechanics for their repair; if, therefore, you find in this case that the defendant kept on hand and furnished proper ropes for the making of tails for the tubs used by it, and which could be had by its employees upon application therefor, and if you find that the defective condition of the tail used by Ryan at the time of the accident was discoverable by him by the use of ordinary powers of observation and common prudence, I charge you that it was the duty of said Ryan to have applied for and obtained from the defendant a proper rope for the making of a new tail, or to have repaired the tail upon the tub himself, and that his failure and negligence to do so was contributory negligence on his part, by reason of which the plaintiffs in this action cannot recover."

The plaintiff also excepted to the following portion of the charge of the Court:

"The application of that principle of law is illustrated in that way: Suppose it is the duty of the master to furnish a proper donkey engine to the servants who are engaged in unloading a vessel,one that is ordinarily safe and properly adjusted, and he furnishes an engine that is not in proper condition, one that is not safe, and the engine explodes, or is subjected to some accident by reason of apparent defect which injures one of the servants employed in the operation of the business. It is the positive duty

of the master to supply the servants with a proper engine and machinery that is safe, and if he fails in that respect, the mere fact that the machinery was operated by an engineer would not make any difference. The master will still be responsible for his failure to furnish the proper sort of safe machinery. That is the rule that you are to apply in this case with respect to this matter, in the view that the master was required to furnish proper and safe appliances."

The plaintiff also excepted to the following portion of the charge of the Court to the jury:

"But on the other hand, you will consider whether or not the duty of keeping this particular tail appliance in repair belonged to Mr. Ryan; whether it was the duty of Mr. Ryan to see that the tail was in order. While it may have been the duty of the master to furnish a safe appliance, still if it was to be performed by Ryan, then his negligence in the matter would of course not make the principal, or master, liable. I think I have made myself understood. If Mr. Ryan was to take care of these tails and see that they were in a safe condition, and when they became unsafe he was to substitute new ones, and that that was his duty, then of course the master would not be responsible for this failure on his part whereby he was injured."

The plaintiff also excepted to the following portion of the charge of the Court to the jury:

"Now, then, the dumpers were the servants working together in the handling of the tubs, so the testimony

tends to show, and who knew of each other's work and labor, and had an opportunity to observe each other's conduct. They were fellow-servants in that respect. They would be fellow-servants in bringing the tub to its place on the platform where it was to be discharged, and in emptying it. They would be fellow-servants in that respect. But if one of these servants—Mr. Ryan, for instance—had the exclusive duty of keeping these tails in repair, a duty that belonged particularly to the master, and he should fail in that respect, his failure could not be that of a fellow-servant with respect to others. But you will observe in respect to this matter that to bring the principals into play in this case, you must find that some other servant handled this tail and kept it in repair, and by reason of that fellow-servant's conduct, the tail became unfit for its use, or its attachment became imperfect. If that was the work of some other servant, not Mr. Ryan, and that person was acting as the agent of the master in putting the tail in that position, and in keeping it in repair, then of course the master would be responsible for his failure in that respect, and the plaintiffs would be entitled to recover in this case. But you will observe that the keeping of this tail in repair was a matter that continued from time to time, and it was a matter that might be required to be performed on one day and another day, and on another tail. So that this keeping of the tail in repair, if you believe it was a continuous duty required to be performed by these servants engaged in this business from day to day, and was a matter in

which they became fellow-servants then the master was not responsible for their failure as fellow-servants to keep it in repair. It is only in the view that some fellow-servant is charged with that specific duty to the exclusion of the other, and in that respect represented the master, that the master would be held responsible for the conduct of the servant."

The plaintiff also excepted to the following portion of the charge of the Court:

"If, therefore, you find in this action that the defective condition of the tail of the tub used by Ryan at the time of the accident was due to the carelessness or negligence of one of the fellow-servants or co-employees of the said Ryan, employed by the defendant in the same general business as the said Ryan, in failing or neglecting to keep the said tail in a proper condition of repair,then I instruct you that the negligence of said fellow-servant or co-employee of the said Ryan in that regard was not negligence upon the part of the defendant, and that the plaintiffs cannot recover in this action."

Plaintiff also excepted to that portion of the charge of the Court to the jury which reads as follows:

"In this case, the question relates to this tail attached to this tub. The persons having to do with that tub were those servants or employees who handled it here at the wharf or vessel. The testimony tends to show that it was the duty of those who were engaged in dumping those tubs to see to it that the tails were kept in order. If that is true those people who were charged with that duty were fel-

low-servants, and the master was not responsible for the conduct of such persons, because one person could observe the conduct of another and know how the other acted, and know whether he attended to his duty or not. So I say that such persons would be considered as fellow-servants in such an employment."

Plaintiff also excepted to that portion of the charge of the Court to the jury which reads as follows:

"I have said something to you about the duty of the master. It is sometimes the duty of the master to provide certain machinery and certain appliances and be responsible with respect to those things. It is the duty of the master to see that they are in order, and it is a positive duty which cannot be performed by a servant in such a way as to absolve the master from responsibility. But you must observe in such case it is where one servant is injured by the failure of the master to provide some appliance or some machinery, but the master may have devolved upon a servant to provide those appliances. You can very well understand that. The master might say he would have a servant look after the machinery or provide ropes and see that they were in order. That duty may be performed by the master through his servant, and if that servant fails to keep them in order and is injured thereby, the representatives of such a servant cannot claim damages for his neglect to keep those things in order, although it is a matter which devolves upon the master primarily. In this case, if the master had made provision, or if there was a custom that these dumpers should keep

these tails in order, then it might be said in one sense that that was the duty of the master. Nevertheless, if it was devolved, as it might very properly be devolved, upon the servant, and if he then failed to keep the appliance in order and suffered therefrom, he would have no recourse against the master. It would be his own fault."

Plaintiff also excepted to that portion of the charge of the court to the jury which reads as follows:

"In this case there was some testimony that it was Ryan's duty to keep these tails in order. If you believe the testimony that it was his duty to keep them in order, and that they hung up there in the engine-room where they could easily be obtained, then neither he nor his representatives could recover for any damages arising therefrom."

Plaintiff also excepted to that portion of the charge of the Court to the jury which reads as follows:

"A master may devolve a duty upon more than one servant as, for instance, upon two or three dumpers. Then those men working together in that way and performing that duty are fellow servants; they became fellow-servants even in such duty, that is to say, in keeping the apparatus in repair, and if there is a failure on the part of one of these servants to keep the appliance in order, then the master is not responsible for it. It is a duty in which the fellow servant has assumed the responsiblity of his fellow-servant's conduct."

The plaintiff also excepted to the refusal of the Court to charge the jury as follows:

"That it is the duty of the master not only to furnish safe appliances, but that that duty is a continuing one; that it is his duty to see that at all times those appliances are kept in reasonably safe condition, and that he is bound to make a proper inspection of the appliances, and that if he fails to make that inspection, he is guilty of neglect; and, that where a defect would be apparent upon a reasonable inspection, and it is allowed to continue, it is presumed that no inspection is made, and the master is liable."

The plaintiff also excepted to that portion of the charge of the Court to the jury which reads as follows:

"I have already instructed you, gentlemen, that the duty of the master with respect to certain matters will be a continuing duty; but I have also instructed you that he may devolve that continuing duty upon a servant to perform, and that if that servant or any of his fellow servants in working together, fails in the performance of that duty, then the master is not responsible. The point is this: that the servant has in such case assumed the responsibility of working with his fellow-servants."

In commemoration of all of which, this 4th day of March, 1897, and within the time allowed by law and the order of this Court, the plaintiffs present this their bill of exceptions, and pray that the same may be settled and allowed as correct, and signed by the Judge of this Court.

REDDY, CAMPBELL & METSON,

Attorneys for Plaintiffs.

It is hereby stipulated that the foregoing bill of exceptions is correct, and that the same was served and presented within due time, and that it may be settled and allowed.

SIDNEY V. SMITH,
Atty. for Defendant.

The foregoing bill of exceptions is correct, and as such is settled and allowed.

Dated March 30, 1897

WM. M. MORROW,
Judge.

[Endorsed]: Filed March 30, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

AT LAW.

MARY AGNES RYAN, and CHARLES RYAN, Jr., a Minor, and MARY RYAN, a Minor, by their Guardian ad litem, MARY AGNES RYAN,
Plaintiffs,
vs.
C. J. SMITH, as Receiver of the Oregon Improvement Company (a Corporation),
Defendant.
} No. 12199.

Petition for Writ of Error.

The plaintiffs in the above-entitled action, feeling themselves aggrieved by the judgment made and entered therein by said Court on the 8th day of July, 1897, against plaintiffs and in favor of defendant, come now by their attorneys, P. Reddy, J. C. Campbell, and W. H. Metson, and petition this Court for an order allowing these plaintiffs a writ of error from the judgment herein to the Honorable United States Circuit Court of Appeals, for the Ninth Circuit, sitting at the city of San Francisco, State

of California, and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the security which plaintiffs shall furnish upon said writ of error.

And petitioners will ever pray ,etc.

P. REDDY,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Plaintiffs-Petitioners.

[Endorsed]: Filed July 7th, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Northern District of California.

MARY AGNES RYAN et al., Plaintiffs,
vs.
C. J. SMITH, Receiver, etc., Defendant.

Assignment of Errors.

The plaintiff in this action in connection with, and in support of its petition fora writ of error, makes the following assignment of errors which it avers occurred upon the trial of the cause, to-wit:

I.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Now, in the course of this business whose duty is it to fix those tails?"

II.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Do you know who, in the course of that business, usually attaches or puts the tails on the tubs?"

III.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. The question is; do you know whose duty it is ordinarily?"

IV.

The Court erred in denying the motion of plaintiff to strike out the answer made by the witness Paulsen to the question:

"Q. Who does?"

V.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Do you know whether or not Ryan was in the habit of attending to the tails on the tubs on which he worked?"

VI.

The Court erred in overruling the objection to the question asked the witness Hichens:

"Q. State what is the custom of the men in regard to mending, repairing, or attending to the tails on the tubs."

VII.

The Court erred in overruling the objection to the question asked the witness Hichens:

"Q. Did you ever see him repairing or arranging the tails of his tubs?"

VIII.

The Court erred in denying plaintiff's motion to strike out the answer made by the witness Hichens to the question:

"Q. Do you know how the rope was spliced?"

IX.

The Court erred in overruling the objection of plaintiff to the question asked the witness Hichens:

"Q. Was the splice made in a braid, or in a twist of the rope?"

X.

The Court erred in overruling the objection of the plaintiff to the question asked the witness Hichens:

"Was, or was not, that an obvious defect?"

XI.

The Court erred in denying the motion of defendant to strike out the answer of the witness Hichens to the question:

"Q. I want you to tell the jury, now, how you know that that was spliced properly in the first place?

XII.

The Court erred in charging the jury as follows:

"While it is ordinarily the duty of the master to keep in repair the appliances with which the servant must work, still it is not the master's duty to repair defects arising in the daily use of the appliance, for which proper and suitable materials are supplied by him, and which may be easily remedied by the servant without the help of skilled mechanics for their repair; if, therefore, you find in this case that the defendant kept on hand and furnished proper ropes for the making of tails for the tubs used by it, and which could be had by its employees upon application therefor, and if you find the defective

condition of the tail used by Ryan at the time of the accident was discoverable by him by use of ordinary powers of observation and common prudence, I charge you that it was the duty of said Ryan to have applied for and obtained from the defendant a proper rope for the making of a new tail, or to have repaired the tail upon the tub himself, and that his failure and negligence to do so was contributory negligence on his part, by reason of which the plaintiffs in this action cannot recover."

XIII.

The Court erred in charging the jury as follows:

"The application of the principle of the law is illustrated in this way: Suppose it is the duty of the master to furnish a proper donkey engine to the servants who are engaged in unloading a vessel, one that is ordinarily safe and properly adjusted, and he furnishes an engine that is not in proper condition, or that is not safe, and the engine explodes, or is subjected to some accident by reason of apparent defect which injures one of the servants employed in the operation of the business. It is the positive duty of the master to supply the servants with a proper engine and machinery that is safe, and if he fails in that respect, the mere fact that the machinery was operated by an engineer would not make any difference. The master would still be responsible for his failure to furnish the proper sort of safe machinery. That is the rule that you are to apply in this case with respect to this matter,

in the view that the master was required to furnish proper and safe appliances."

XIV.

The Court erred in charging the jury as follows:

"But, on the other hand, you will consider whether or not the duty of keeping this particular tail appliance in repair belonged to Mr. Ryan; whether it was the duty of Mr. Ryan to see that the tail was in order. While it may have been the duty of the master to furnish a safe appliance, still, if it was to be performed by Mr. Ryan, then his negligence in the matter would of course not make the principal or master liable. I think I have made myself understood. If Mr. Ryan was to take care of these tails and see that they were in safe condition, and, when they became unsafe, he was to substitute new ones, and that was his duty, then of course the master would not be responsible for the failure on his part whereby he was injured."

XV.

The Court erred in charging the jury as follows:

"Now, then, the dumpers were the servants working together in the handling of the tubs, so the testimony tends to show, and who knew of each other's work and labor, and had an opportunity to observe each other's conduct. They were fellow-servants in that respect. They would be fellow-servants in bringing the tub to its place on the platform where it was to be discharged, and

in emptying it. They would be fellow-servants in that respect. But if one of these servants—Mr. Ryan, for instance—had the exclusive duty of keeping these tails in repair, a duty that belonged particularly to the master, and he should fail in that respect, his failure could not be that of a fellow-servant with respect to others. But you will observe in respect to this matter that to bring the principals into play in this case, you must find that some other servant handled this tail and kept it in repair, and by reason of that fellow-servant's conduct, the tail become unfit for its use, or its attachment became imperfect. If that was the work of some other servant, not Mr. Ryan, and that person was acting as the agent of the master in putting the tail in that position, and in keeping it in repair, then of course the master would be responsible for its failure in that respect, and the plaintiffs would be entitled to recover in this case. But you will observe that the keeping of this tail in repair was a matter that continued from time to time, and it was a matter that might be required to be performed on one day and another day, and on another tail. So that this keeping of the tail in repair, if you believe it was a continuous duty required to be performed by these servants engaged in this business from day to day, and was a matter in which they became fellow-servants, then the master was not responsible for their failure as fellow-servants to keep it in repair. It is only in the view that some fellow-servant is charged with that specific duty to the exclusion of the other, and in that respect represented the master, that the master would be held responsible for the conduct of the servant."

XVI.

The Court erred in charging the jury as follows:

"If, therefore, you find in this action that the defective condition of the tail of the tub used by Ryan at the time of the accident was due to the carelessness or negligence of one of the fellow-servants or co-employees of the said Ryan, employed by the defendant in the same general business as the said Ryan, in failing or neglecting to keep the said tail in proper condition or repair, then I instruct you that the negligence of the said fellow-servant or co-employee of the said Ryan in that regard was not negligence upon the part of the defendant, and that the plaintiff cannot recover in this action."

XVII.

The Court erred in charging the jury as follows:

"In this case, the question relates to the tail attached to this tub. The persons having to do with that tub were those servants or employees who handled it here at the wharf or vessel. The testimony tends to show that it was the duty of those who were engaged in dumping those tubs to see to it that the tails were kept in order. If that is true, those people who are charged with the duty were fellow-servants, and the master was not responsible for the conduct of such persons, because one person could observe the conduct of another and know how the other acted, and know whether he attended to his duty or not.

So I say that such persons would be considered as fellow-servants in such an employment."

XVIII.

The Court erred in charging the jury as follows:

"I have said something to you about the duty of the master. It is sometimes the duty of the master to provide certain machinery and appliances, and be responsible with respect to those things. It is the duty of the master to see that they are in order, and it is a positive duty which cannot be performed by a servant in such a way as to absolve the master from responsibility. But you must observe in such case it is where one servant is injured by the failure of the master to provide some appliance or some machinery, but the master may have devolved upon a servant to provide those appliances. You can very well understand that. The master might say he would have a servant look after the machinery or provide ropes and see that they were in order. That duty may be performed by the master through his servant, and if that servant fails to keep them in order and is injured thereby, the representatives of such a servant cannot claim damages for his neglect to keep those things in order, although it is a matter which devolves upon the master primarily. In this case, if the master had made provision, or if there was a custom that these dumpers should keep these tails in order, then it might be said in one sense that that was the duty of the master. Nevertheless, if it was devolved, as

it might very properly be devolved, upon the servant, and if he then failed to keep the appliance in order and suffered therefrom, he would have no recourse against the master. It would be his own fault."

XIX.

The Court erred in charging the jury as follows:

"In this case there was some testimony that it was Ryan's duty to keep these tails in order. If you believe the testimony that it was his duty to keep them in order, and that they hung up there in the engine-room where they could easily be obtained, then neither he nor his representatives could recovee for any damage arising therefrom."

XX.

The Court erred in charging the jury as follows:

"A master may devolve a duty upon more than one servant, as, for instance, upon two or three dumpers. Then those men working together in that way and performing that duty are fellow-servants; they become fellow-servants even in such duty, that is to say, in keeping the apparatus in repair and if there is a failure on the part ofone of these servants to keep the appliance in order, then the master is not responsible for it. It is the duty in which the fellow-servant has assumed the responsibility of his fellow-servant's conduct."

XXI.

The Court erred in refusing to charge the jury as follows:

"That it is the duty of the master not only to furnish safe appliances, but that that duty is a continuing one; that it is his duty to see that at all times those appliances are kept in reasonably safe condition and that he is bound to make a proper inspection of those appliances and that if he fails to make that inspection he is guilty of neglect; and that where a defect would be apparent upon a reasonable inspection, and it is allowed to continue, it is presumed that no inspection is made, and the master is liable."

XXII.

The Court erred in charging the jury as follows:

"I have already instructed you, gentlemen, that the duty of the master with respect to certain matters will be a continuing duty; but I have also instructed you that he may devolve that continuing duty upon a servant to perform, and that if the servant, or any of his fellow-servants in working together, fails in the performance of that duty, then the master is not responsible. The point is this: that the servant has in such case assumed the responsibility of working with his fellow-servants."

And the plaintiffs, Mary Agnes Ryan et al., pray that said judgment be reversed, annulled, and altogether for

naught held, and that it may be restored to all things which it has lost by occasion of said judgment.

P. REDDY,
J. C. CAMPBELL,
W. H. METSON,
Attorneys for Plaintiffs.

[Endorsed]: Filed July 7, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

MARY AGNES RYAN, and CHARLES RYAN, Jr., a Minor, and MARY RYAN, a Minor, by their Guardian ad litem, MARY AGNES RYAN,
Plaintiffs,

vs.

C. J. SMITH, as Receiver of the Oregon Improvement Company (a Corporation),
Defendant.

Order for Writ of Error.

This seventh day of July, 1897, came the plaintiffs, by their attorneys, P. Reddy, J. C. Campbell, and W. H. Met-

son, and filed herein and presented to the Court their petition praying for an allowance of a writ of error intended to be urged by said plaintiffs. On consideration whereof it is ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment hereinbefore, on the 8th day of January, 1897, made and entered herein against plaintiffs and in favor of defendant, be, and the same is hereby, allowed, and that a certified transcript of the record be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit, upon a bond being given and approved by the undersigned Judge, or in his absence by the clerk of said court, conditioned in the sum of five hundred dollars, that the said plaintiffs shall prosecute their writ to effect, and if they fail to make their plea good, shall answer all costs.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Order for Writ of Error. Filed July 7th, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

MARY AGNES RYAN, and CHARLES RYAN, Jr., a Minor, and MARY RYAN, a Minor, by their Guardian ad litem, MARY AGNES RYAN,

Plaintiffs,

vs.

C. J. SMITH, as Receiver of the Oregon Improvement Company (a Corporation),

Defendant.

Bond on Writ of Error.

Know All Men By These Presents, That we, Jacob A. Wilkens, Frank C. Drew, and Chas. H. Maas, all of the city and county of San Francisco, as sureties for the plaintiffs, are held and firmly bound unto the above-named C. J. Smith, Receiver of the Oregon Improvement Company, a corporation, in the sum of five hundred dollars, lawful money of the United States, to be paid to the said C. J. Smith, receiver, his successors and assigns, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, exe-

cutors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 7th day of July, 1897.

Upon condition, nevertheless, that whereas the above-named plaintiffs have prosecuted a writ of error to correct a judgment rendered in the above-entitled suit by a judge of the Circuit Court of the United States for the Northern District of California—

Now, therefore, if the above-named plaintiffs shall prosecute said writ of error to effect, and if they fail to make their plea good shall answer all costs, then this obligation to be void; otherwise to remain in full force and virtue.

JACOB A. WILKENS. (Seal)
FRANK C. DREW. (Seal)
CHAS. H. MAASS.

United States of America,
Northern District of California, } ss.
City and County of San Francisco.

Frank C. Drew and Chas. H. Maass. the sureties whose names are subscribed to the foregoing bond, being severally duly sworn, each for himself says: I am a resident of the Northern District of California and a freeholder or householder therein, and am worth the sum in the foregoing bond specified as the penalty thereof over and above all my just debts and liabilities, exclusive of property exempt from execution.

FRANK C. DREW.
CHAS. H. MAASS.

Subscribed and sworn to before me, this 7 day of July, 1897.

[Seal] SOUTHARD HOFFMAN,
Clerk U. S. Cir. Ct., N. D. Cal.

[Seal of U. S. Circuit Court.]

The foregoing bond approved this 7th day of July, 1897.

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, N. D. Cal.

[Endorsed]: Filed July 7th, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

Writ of Error (Lodged Copy).

THE UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States for Northern District of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court before the Honorable W. W. Morrow, Circuit Judge, between Mary Agnes Ryan and Charles Ryan, Jr., a minor, and Mary Ryan, a minor, by their guardian

ad litem, Mary Agnes Ryan, plaintiffs, and C. J. Smith, as receiver of the Oregon Improvement Company a corporation, defendant, a manifest error hath happened to the great damage of the said plaintiffs, as by complaint doth appear, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, openly and distinctly, you send the record and the proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco on the 6th day of August, 1897, in said Circuit Court of Appeals to be then and there held; that the record and proceedings being then and there inspected, the said Circuit Court of Appeals may cause further to be done herein to correct that error which of right and according to laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States Supreme Court, this 7th day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, Northern District of California.

The within copy of writ of error lodged in the office of Clerk of the Circuit Court, Ninth Circuit,

Northern District of California, this 7th day of July, 1897, for the within-named defendant in error.

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, N. D. Cal.

[Endorsed]: Filed July 7, 1897. Southard Hoffman, Clerk.

In the Circuit Court of the United States of the Ninth Judicial Circuit, Northern District of California.

MARY AGNES RYAN, et al.,
Plaintiffs,
vs.
C. J. SMITH, as Receiver, etc
Defendant.

Clerk's Certificate to Transcript.

I, Southard Hoffman, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing written pages, numbered from 1 to 69, inclusive, to be a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause, as the same remains of record and on file in

the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing transcript of record is $41.40, and that said amount was paid by Reddy, Campbell and Metson, Attorneys for Plaintiff.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 31st day of July, A. D. 1897.

[Seal] SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Northern District of California.

Writ of Error.

THE UNITED STATES OF AMERICA—ss.

The President of the United States of America, to the Judges of the Circuit Court of the United States for Northern District of California, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in said Circuit Court before the Honorable W. W. Morrow, Circuit Judge, between Mary Agnes Ryan and Charles Ryan, Jr., a minor, and Mary Ryan, a minor, by their guardian ad litem, Mary Agnes Ryan, plaintiffs, and C. J. Smith, as receiver of the Oregon Improvement Company a corporation, defendant, a manifest error hath happened to the great damage of the said plaintiffs, as by complaint

doth appear, and we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, open and distinctly, you send the record and the proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco on the 6th day of August, 1897, in said Circuit Court of Appeals to be then and there held; that the record and proceedings being then and there inspected, the said Circuit Court of Appeals may cause further to be done herein to correct that error which of right and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States Supreme Court, this 7th day of July, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal] SOUTHARD HOFFMAN,

Clerk of the Circuit Court of the United States, Northern District of California.

[Endorsed]: Writ of Error. Filed July 7, 1897. Southard Hoffman, Clerk.

Return to Writ of Error.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial District, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] SOUTHARD HOFFMAN,
Clerk.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to C. J. Smith, Receiver of the Oregon Improvement Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the

State of California, on the 6th day of August next, pursuant to a writ of error lodged in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 12199, wherein Mary Agnes Ryan and Charles Ryan, Jr., a minor, and Mary Ryan, a minor, (by their guardian ad litem, Mary Agnes Ryan), are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this seventh day of July,A. D. 1897.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this 7th day of July, 1897.

SIDNEY V. SMITH,
Attorney for Defendant in Error.

[Endorsed]: Citation. Filed July 7, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

[Endorsed]: No. 393. In the United States Circuit Court of Appeals for the Ninth Circuit. Mary Agnes Ryan and Charles Ryan, Jr., a Minor, and Mary Ryan, a Minor, by their Guardian ad litem, Mary Agnes Ryan, Plaintiffs in Error, vs. C. J. Smith, as Receiver of the Oregon Improvement Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the Circuit Court of the United States for the Northern District of California.

Filed Aug. 6, 1897.

F. D. MONCKTON,

Clerk.

No. 393.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY AGNES RYAN and CHARLES RYAN JR., a Minor, and MARY RYAN, a Minor, by their Guardian *ad litem* MARY AGNES RYAN,

Plaintiffs in Error,

vs.

C. J. SMITH, as Receiver, etc., of the Oregon Improvement Company, a Corporation,

Defendant in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

P. REDDY,
J. C. CAMPBELL AND
W. H. METSON,
Attorneys for Plaintiffs in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY AGNES RYAN and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by MARY AGNES RYAN,
Plaintiffs in Error.

vs.

C. J. SMITH, Receiver of the Oregon Improvement Company, a Corporation,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

This case comes to this Court on a writ of error to the Circuit Court of the United States for the Northern District of California (Record, p. 89) to reverse the final judgment of that Court (Record, p. 17), which judgment was in favor of the defendant in error, and against the plaintiffs in error. The case was tried by a jury, who rendered a verdict for the defendant in error. (Record, p. 16.)

The plaintiffs in error, during the progress of the trial, excepted to certain rulings of the Court, as specified in the assignment of errors. (Record, pp. 64-74.)

The plaintiffs in error in their complaint (Record, p. 3)

allege, in substance, that the Oregon Improvement Company was a corporation, organized and existing under and by virtue of the laws of the State of Oregon; that on the 7th day of October, 1895, and for a long time prior thereto, the said corporation was the owner of and operated and controlled a system of railroads, steamships, and other vessels, and owned and operated coal mines situate in the States of California, Oregon and Washington; that C. J. Smith was duly made and appointed receiver of said corporation, with power to operate and manage its business; that on the 7th day of October, 1895, said C. J. Smith duly qualified and entered upon the discharge of said duties, and is now receiver; that on the 13th day of March, 1896, one Charles Ryan was employed by said defendant in his capacity of receiver, and was engaged, under the direction of said receiver, in assisting unloading coal from a certain vessel known and called the bark "Empire," then and there in the possession and use of said receiver in the City and County of San Francisco, State of California; that said Charles Ryan was required, in the performance of his duties, to stand upon a platform on said vessel "Empire," and when a large tub or bucket containing coal was hoisted, to take hold of the "tail" or rope attached to said tub and dump it; that said defendant negligently failed to furnish said tub with a "tail" of sufficient strength for the purpose for which it was used, so that when said Charles Ryan took hold of the same on said day, in the usual and ordinary manner, the said "tail" broke and gave way, and by reason thereof the said Charles Ryan was caused to fall, and was precipitated down an open hatchway on said vessel a distance of forty-five feet, and received injuries from which he died

on the same day; that said Charles Ryan received said injuries, resulting in his death as aforesaid, solely by reason of the negligence of said defendant in providing and furnishing an unsafe and insecure 'tail" to said tub.

To this complaint the defendant filed his answer (Record, p. 13), in which he denied that he negligently failed to furnish the tub with a "tail" of sufficient strength for the purpose for which it was used, or that said Charles Ryan received the injuries mentioned in the complaint solely or at all by reason of the negligence of defendant in providing an unsafe or insecure "tail" to said tub, or by reason of any negligence of said defendant whatever; and for a further and separate answer, defendant alleged that said Charles Ryan received the injuries mentioned in the complaint by reason of his own negligence directly and proximately contributing to and causing such injuries.

After the testimony for the plaintiffs was all in, the defendant moved the Court to direct the jury to render a verdict for the defendant, and, after argument of counsel, the motion was denied. (Record, p. 29.)

The plaintiffs requested the Court to give a certain instruction t o the jury, which was refused, and not given; nor did the Court embody the same, or any part thereof, in his charge to the jury. (Record, p. 54.)

The Court also gave certain instructions to the jury, to the giving of which the plaintiff excepted. (Record, p.

SPECIFICATION OF ERRORS.

I.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Now, in the course of this business whose duty "is it to fix those tails?"

II.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Do you know who, in the course of that business, "usually attaches or puts the tails on the tubs?"

III.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. The question is, do you know whose duty it is "ordinarily?"

IV.

The Court erred in denying the motion of plaintiff to strike out the answer made by the witness Paulsen to the question:

"Q. Who does?"

V.

The Court erred in overruling the objection to the question asked the witness Paulsen:

"Q. Do you know whether or not Ryan was in the

" habit of attending to the tails on the tubs on which he " worked?"

VI.

The Court erred in overruling the objection to the question asked the witness Hichens:

" Q. State what is the custom of the men in regard to " mending, repairing, or attending to the tails on the " tubs."

VII.

The Court erred in overruling the objection to the question asked the witness Hichens:

" Q. Did you ever see him repairing or arranging the " tails of his tubs?"

VIII.

The Court erred in denying plaintiff's motion to strike oue the answer made by the witness Hichens to the question:

" Q. Do you know how the rope was spliced?"

IX.

The Court erred in overruling the objection of plaintiff to the question asked the witness Hichens:

" Q. Was the splice made in a braid, or in a twist of " the rope?"

X.

The Court erred in overruling the objection of the plaintiff to the question asked the witness Hichens:

" Q. Was, or was not, that an obvious defect?"

XI.

The Court erred in denying the motion of defendant to strike out the answer of the witness Hichens to the question:

"Q. I want you to tell the jury, now, how you know "that that was spliced properly in the first place?"

XII.

The Court erred in charging the jury as follows:

"While it is ordinarily the duty of the master to keep "in repair the appliances with which the servant must "work, still it is not the master's duty to repair defects "arising in the daily use of the appliance, for which "proper and suitable materials are supplied by him, and "which may be easily remedied by the servant without "the help of skilled mechanics for their repair; if, there-"fore you find in this case that the defendant kept on "hand and furnished proper ropes for the making of tails "for the tubs used by it, and which could be had by its "employes upon application therefor, and if you find the "defective condition of the tail used by Ryan at the time "of the accident was discoverable by him by use of ordi-"nary powers of observation and common prudence, I "charge you that it was the duty of said Ryan to have "applied for and obtained from the defendant a proper "rope for the making of a new tail, or to have repaired "the tail upon the tub himself, and that his failure and "negligence to do so was contributory negligence on his "part, by reason of which the plaintiffs in this action "cannot recover."

XIII.

The Court erred in charging the jury as follows:

"The application of the principle of the law is illus-
"trated in this way: Suppose it is the duty of the master
"to furnish a proper donkey engine to the servants who
"are engaged in unloading a vessel, one that is ordinarily
"safe and properly adjusted, and he furnishes an engine
"that is not in proper condition, or that is not safe, and
"the engine explodes, or is subjected to some accident by
"reason of apparent defect which injures one of the serv-
"ants employed in the operation of the business. It is
"the positive duty of the master to supply the servants
"with a proper engine and machinery that is safe, and if
"he fails in that respect the mere fact that the machinery
"was operated by an engineer would not make any differ-
"ence. The master would still be responsible for his
"failure to furnish the proper sort of safe machinery.
"That is the rule that you are to apply in this case with
"respect to this matter, in the view that the master was
"required to furnish proper and safe appliances."

XIV.

The Court erred in charging the jury as follows:

"But, on the other hand, you will consider whether or
"not the duty of keeping this particular tail appliance in
"repair belonged to Mr. Ryan; whether it was the duty of
"Mr. Ryan to see that the tail was in order. While it may
"have been the duty of the master to furnish a safe appli-
"ance, still, if it was to be performed by Mr. Ryan, then
"his negligence in the matter would of course not make

"the principal or master liable. I think I have made "myself understood. If Mr. Ryan was to take care of "these tails, and see that they were in safe condition, and "when they became unsafe, he was to substitute "new ones, and that was his duty, then of course the mas- "ter would not be responsible for the failure on his part "whereby he was injured."

XV.

The Court erred in charging the jury as follows:

"Now, then, the dumpers were the servants working "together in the handling of the tubs, so the testimony "tends to show, and who knew of each other's work and "labor, and had an opportunity to observe each other's "conduct. They were fellow-servants in that respect. "They would be fellow-servants in bringing the tub to its "place on the platform where it was to be discharged, "and in emptying it. They would be fellow-servants in "that respect. But if one of these servants—Mr. Ryan, for "instance—had the exclusive duty of keeping these tails "in repair, a duty that belonged particularly to the "master, and he should fail in that respect, his failure "could not be that of a fellow-servant with respect to "others. But you will observe in respect to this matter "that to bring the principals into play in this case, you "must find that some other servant handled this tail and "kept it in repair, and by reason of that fellow-servant's "conduct, the tail became unfit for its use, or its attach- "ment became imperfect. If that was the work of some "other servant, not Mr. Ryan, and that person was acting

"as the agent of the master in putting the tail in that "position, and in keeping it in repair, then of course the "master would be responsible for its failure in that re- "spect, and the plaintiffs would be entitled to recover in "this case. But you will observe that the keeping of this "tail in repair was a matter that continued from time to "time, and it was a matter that might be required to be "performed on one day and another day and on another "tail. So that this keeping of the tail in repair, if "you believe it was a continuous duty required to "be performed by these servants engaged in this business "from day to day, and was a matter in which they be- "came fellow-servants, then the master was not responsi- "ble for their failure as fellow-servants to keep it in re- "pair. It is only in the view that some fellow-servant is "charged with that specific duty to the exclusion of the "other, and in that respect represented the master, that "the master would be held responsible for the conduct "of the servant."

XVI.

The Court erred in charging the jury as follows:

"If, therefore, you find in this action that the defective "condition of the tail of the tub used by Ryan at the time "of the acicdent was due to the carelessness or negligence "of one of the fellow-servants or co-employes of the said "Ryan, employed by the defendant in the same general "business as the said Ryan, in failing or neglecting to "keep the said tail in proper condition or repair, then I "instruct you that the negligence of the said fellow-ser- "vant or co-employe of the said Ryan in that regard was

" not negligence upon the part of the defendant, and that " the plaintiff cannot recover in this action."

XVII.

The Court erred in charging the jury as follows:

" In this case, the question relates to the tail attached " to this tub. The persons having to do with that tub " were those servants or employes who handled it here at " the wharf or vessel. The testimony tends to show that " it was the duty of those who were engaged in dumping " those tubs to see to it that the tails were kept in order. " If that is true, those people who are charged with the " duty were fellow-servants, and the master was not re- " sponsible for the conduct of such persons, because one " person could observe the conduct of another and know " how the other acted, and know whether he attended to " his duty or not. So I say that such persons would be " considered as fellow-servants in such an employment."

XVIII.

The Court erred in charging the jury as follows:

"I have said something to you about the duty of the " master. It is sometimes the duty of the master to pro- " vide certain machinery and appliances, and to be re- " sponsible with respect to those things. It is the duty " of the master to see that they are in order, and it is a " positive duty which cannot be performed by a servant " in such a way as to absolve the master from responsi- " bility. But you must observe in such case it is where " one servant is injured by the failure of the master to

"provide some appliance or some machinery, but the "master may have developed upon a servant to provide "those appliances. You can very well understand that. "The master might say he would have a servant look after "the machinery, or provide ropes and see that they were "in order. That duty may be performed by the master "through his servant, and if that servant fails to keep "them in order and is injured thereby, the representa- "tives of such a servant cannot claim damages for his "neglect to keep those things in order, although it is a "matter which devolves upon the master primarily. In "this case, if the master had made provision, of if there was "a custom that these dumpers should keep these tails in "order, then it might be said in one sense that that was "the duty of the master. Nevertheless, if it was devolved, "as it might very properly be devolved, upon the servant, "and if he then failed to keep the appliance in order and "suffered therefrom, he would have no recourse against "the master. It would be his own fault."

XIX.

The Court erred in charging the jury as follows:

"In this case there was some testimony that it was "Ryan's duty to keep these tails in order. If you believe "the testimony that it was his duty to keep them in order, "and that they hung up there in the engine-room where "they could easily be obtained, then neither he nor his "representatives could recover for any damage arising "therefrom."

XX.

The Court erred in charging the jury as follows:

"A master may devolve a duty upon more than one "servant, as, for instance, upon two or three dumpers. "Then those men working together in that way and per- "forming that duty are fellow-servants; they become "fellow-servants even in such duty, that is to say, in keep- "ing the apparatus in repair, and if there is a failure on "the part of one of these servants to keep the appliance "in order, then the master is not responsible for it. It is "the duty in which the fellow-servant has assumed the "responsibility of his fellow-servant's conduct."

XXI.

The Court erred in refusing to charge the jury as follows:

"That it is the duty of the master not only to furnish "safe appliances, but that that duty is a continuing one; "that it is his duty to see that at all times those appli- "ances are kept in reasonably safe condition, and that "he is bound to make a proper inspection of those appli- "ances, and that if he fails to make that inspection he is "guilty of neglect; and that where a defect would be ap- "parent upon a reasonable inspection, and it is allowed "to continue, it is presumed that no inspection is made, "and the master is liable."

XXII.

The Court erred in charging the jury as follows:

"I have already instructed you, gentlemen, that the

"duty of the master with respect to certain matters will "be a continuing duty; but I have also instructed you "that he may devolve that continuing duty upon a serv- "ant to perform, and that if the servant, or any of his "fellow-servants in working together, fails in the per- "formance of that duty, then the master is not responsi- "ble. The point is this: that the servant has in such case "assumed the responsibility of working with his fellow- "servants."

ARGUMENT.

I.

It was error for the Court to charge that the deceased was a fellow-servant of the person or persons upon whom devolved the duty of affixing to the coal tubes new and safe tail ropes in place of the old and worn out ones, and that the defendant was not liable for any injury flowing from the negligence of said person or persons in failing to perform said duty. (Record, p. 71.)

In our view of the case, it is within the rule which holds the master liable for the neglect of his servants in not providing suitable and safe appliances, apparatus, machinery or tools for doing the work, and which the other servants of the company are called upon to use in doing such work. We do not believe the master has performed his full duty when he has delivered to his servants a quantity of apparatus in a separate and detached condition, such detached parts being in a safe condition; or that any negligence in putting such machinery together

and adjusting it on the vessel for the performance of its work is not to be attributed to the master.

A different rule would be in conflict with the spirit, if not the letter, of the doctrine, well established in this Court, as well as in the Courts of other States, and of the Supreme Court of the United States, viz.: "That the "master owes an absolute duty to his employes to furnish "them with reasonable, suitable, and safe machinery and "other appliances with which they are required to do "their work, or with which they may come in contact "while doing their work; and this duty being one which "the company is bound to perform, it cannot be excused "from its performance by intrusting it to an employe "or officer who may neglect to perform such duty."

King *vs.* Railroad Co., 11 Biss., 362.
O'Neil *vs.* Railroad Co., 3 McCrary, 432.
Hough *vs.* Railway Co., 100 U. S., 213.
Sanborn *vs.* Madera Flume Co., 70 Cal., 265.
Beeson *vs.* Green Mountain Co., 57 Cal., 26.
Baxter *vs.* Roberts, 44 Cal., 187.
McNamara *vs.* McDonough, 102 Cal., 575.
Brabbitts *vs.* Railway Co., 38 Wis., 289.
Porter *vs.* Railroad, 60 Mo., 160.
Railroad Co. *vs.* Fitzpatrick, 31 Ohio St., 479.
Fuller *vs.* Jewett, 80 N. Y., 46.
Drymala *vs.* Thompson, 26 Minn., 40.
Railway Co. *vs.* Jackson, 55 Ill., 492.

Many other cases might be cited to the same point, and few, if any, well considered cases hold a contrary doctrine.

It is also the further duty of the master to keep the machinery, apparatus, and other appliances to be used by its employes in a reasonably safe and proper condition for use, and that the duty to do so cannot be delegated to any agent, employe or officer, so as to relieve himself of such duty. This rule differs from that adopted in England and in Massachusetts and some other States, but it is in accord with the decisions of the Court of Appeals of New York, most of the other States and of the Supreme Court of the United States. See cases above cited, and Davis *vs.* Railroad Co., 55 Vt., 84; Wharton Ag., Sec. 232; Pierce R. R., 370; Crispin *vs.* Babbitt, 81 N. Y., 516; Dana *vs.* New York Cent. Ry., 92 N. Y., 639. The proposition that the master is not liable for the negligence of one of his employes or servants, whose duty it is to assist in adjusting and putting in working order a machine or other appliance which is to be used in doing his work, is sustained alone by the English and Massachusetts decisions, or by the Courts which have adopted the rule laid down by these Courts, and are all in conflict with the decisions of the Courts noted above. The English and Massachusetts cases all go upon the ground, if carried out logically, that the master is not bound absolutely to furnish his employes with reasonably safe and perfect machinery or appliances with which to do their work, but that his duty ends when he has provided suitable material out of which the machinery or appliances may be constructed and then employs competent persons to construct and keep them in repair, and that negligence in the construction and keeping in repair in such case is the negligence of a co-employe,

for which the master is not liable; whereas, the Courts following the rule of the Federal Courts hold that the duty of the master does not cease until the machinery or appliances to be used by his employe are put in a safe condition for use, and then constantly kept in such safe condition, and that the employe, whose duty it is to see that such machines and appliances are properly constructed and put in safe condition for use, and to keep them in such condition, in this respect represents the master, and his negligence in the performance of his duty is the neglect of the master, for which the master is liable, although such employe may in other respects be the co-employe of the person injured by such negligence.

The line of distinction is clear; the master is not liable for the negligent use of such machinery or appliances by his employes, from which negligent use an injury happens to a co-employe; but he is liable for neglect in furnishing reasonably safe machinery and appliances for the use of his employes, and to keep them in such safe condition.

"To provide machinery and keep it in repair, and " to use it for the purpos efor which it was intended, are " very distinct matters. They are not employments in " the same common business tending to the same common " result. The one can properly be said to begin only " where the other ends. The servant has no more re- " sponsibility over the repairs than of the purchasing. " The employer assumes the responsibility that the work " shall be done with due care; and as the responsibility " continues so long as the means are used, so must the

"same care be exercised in keeping the required means in "the same condition as at first. * * * In the repair "of the machinery the servant represented the master in "the performance of his part of the contract, and there- "fore his negligence in that respect is the omission of the "master or employer, in contemplation of law."

Shanny *vs.* Androscoggin Mills, 66 Me., 420.

As to those servants who are engaged in making repairs upon appliances, they are as much representatives of the master as those who, in his place, furnish such appliances in the first instance, so far as those employes who are to use them after such repairs have been made are concerned. The duty to furnish reasonably safe appliances includes the care and duty of maintaining them in such condition.

Anderson *vs.* Railway Co., 39 Minn., 523.
Wells *vs.* Coe, 9 Colo., 159.
Miller *vs.* S. P. Co., 20 Or., 285.
Carlson *vs.* Railway Co., 21 Or., 450.

Servants whose duty it is to put up and keep machinery in repair are not fellow-servants with those engaged or employed to use it.

Tudor Iron Works *vs.* Weber, 31 Ill. App. 306.
Holton *vs.* Daly, 4 Ill. App., 25.

Those engaged in supplying and maintaining in repair the premises, ways, appliances and machinery are en-

gaged in a distinct employment from those whose duties are in the use of them, and they are not fellow-servants.

Brann *vs.* Railway Co., 53 Iowa, 597.
Thielman *vs.* Moeller, 73 Iowa, 108.
Roux *vs.* Lumber Co., 94 Mich., 607.

"The two kinds of business are as distinct as the mak-
"ing and repairing of a carriage is from the running
"of it."

Northern Pac. Ry. *vs.* Herbert, 116 U. S., 650.

II.

The Court erred in charging that it was the duty of deceased to apply for a new rope and remedy the defect in the appliance. (Record, pp. 67-68.)

This would impose upon said deceased the duty of inspecting said appliance, and charges him with liability for whatsoever defects or dangers may have lurked therein.

The duty of inspection, we submit, devolved not upon the deceased, but upon the master, and was a personal, positive duty which could not be delegated. Where an employe of the master is called upon to use a machine after its construction is completed, and he is injured by the negligence of those who constructed the same in not constructing it in a suitable and safe manner, the master is liable for such injury; and those who may be employed in helping to construct the machine, and who are afterwards called upon to use it, may hold the master liable for an injury resulting from any neglect or carelessness in its construction, of which he was himself not guilty,

and of which he had no knowledge. The ground of the master's liability rests upon the established rule that it is his duty to inspect and test the machine before it is put into use; and if he puts it into use without such inspection and test, he is liable for an injury resulting from any defects which might have been discovered thereby; and the person engaged in the construction of such machinery or who is directed to operate the same, who is not in fault himself and has no knowledge of any negligence of his co-employee in such work, has the same right as any other employee of the master to demand of him that he shall do his duty in regard to making such inspection and tests before he shall be called upon to use the machine in doing other work for the master. "Due care requires the mas-" ter, especially in the use of dangerous appliances, either " himself or by some other selected for that purpose—in " either case, one competent and qualified—to inspect and " look after the condition of such appliances and see that " they are kept in repair."

Northern Pacific *vs.* Herbert, 116 U. S., 652.

This duty, when the character of the business is such as to require it, is imperative, and must be continuously and positively performed.

Brann *vs.* Railway Co., 53 Iowa, 595.
Bessex *vs.* Railway Co., 45 Wis., 477.

The employer is required not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reason-

able and careful inspection and repair, as will keep the implements which the employe is required to use in such a condition as not unnecessarily to expose him to unknown and extraordinary hazards. The consequences of a negligent performance of that duty must, no matter to whom it may be committed, be visited upon the employer, and not upon the employe who has suffered injury.

Bailey on Masters' Liability, p. 278.
Louisville Ry. *vs.* Buck, 116 Ind., 566.
Cincinnatti Ry. *vs.* McMullen, 117 Ind., 439.

The law charges the master with knowledge of that which he ought to have known, and he ought to know that which, by the exercise of due and reasonable care, he would have discovered.

Wedgwood *vs.* Railway, 41 Wis., 478.

More certain and vigorous methods, more constant and vigilant care, are required in inspecting and testing such appliances as, by constant use, are likely to become defective and out of repair, especially in dangerous employments, than machinery and appliances that are not obviously dangerous, and, from their nature and construction, not likely to become defective or out of repair. Some parts require more frequent and more rigid inspection and watchfulness than others, and different tests in character must be applied to different parts. The failure of the master to inspect renders him thereby liable if it appears, from the nature of the business, the manner of the use of the appliance and the character of the appli-

ance itself, that the master, in the exercise of ordinary care, should have seen the necessity of such precaution of inspection.

Lafflin *vs.* Buffalo Ry., 106 N. Y., 140.
Morgan *vs.* Hudson River Ore Co., 133 N. Y., 666.

Reason and experience unite in affirming that an owner does not exercise even ordinary care who gives no attention to the effect upon ropes, belts, timbers or the like, which is produced by the wear of continued use.

Indiana Car. Co. *vs.* Parker, 100 Ind., 193.
Rapho *vs.* Moore, 68 Pa. St., 404.

The case of Johnson *vs.* Spear, 76 Mich., 139, is very similar to the case at bar. Plaintiff was employed to assist in unloading coal from defendant's vessel by means of a hoisting apparatus like the one now in controversy. With the engine, and as a part of the appliance used for hoisting coal, and furnished by defendant, was a chain about thirty feet long. The links were five-eighths to seven-eighths inch round iron when the chain was new. One end of the chain was made fast to a drum, the other end being fastened to a rope, which ran through pulleys fastened blocks in the rigging of the vessel, nearly over the hatchways, and to this rope the buckets were attached, which were filled in the hold of the vessel and drawn up by the engine to the platform.

Defendant testified that it was his place to buy new chains when the old ones were worn out; that he was to be notified of the need of the same; that he received no

notification previous to the time of the breakage, and had no knowledge of any defect in the chain which would render it insufficient for the business for which it was used. It appeared that he had bought five new chains, and never but one personally.

Plaintiff was in the hold of the vessel, shoveling coal into a bucket, when, in hoisting the bucket, the chain broke, and the bucket fell into the hold and injured him. Plaintiff claimed that the chain was so worn as to become weakened and dangerous for the purpose, and that it was the defendant's duty not only to furnish in the first instance safe machinery and appliances to do the work of hoisting, but it was his duty to inspect the machinery and appliances and see that it remained safe and sufficient for the use to which it was applied; that the defendant neglected this duty, and by reason of such neglect the plaintiff was injured. Defendant was held liable.

The Court said: "The master must exercise reasonable " and proper wachfulness as to the condition of the appli- " ances and guard against dangers liable to arise from " ordinary wear and use, from which they may become " weakened or unfit for the purpose for which they are " supplied.

" The care required necessarily has relation to the " parties, the business in which they are engaged, the " wear and tear upon the machinery, and the varying " exigencies which require vigilance and attention con- " forming in amount and degree to the circumstances of " each particular case. It is not necessary, in order to " recover for injuries arising from defective machinery,

"that the master had actual knowledge of such defects,
"but it is enough to show such facts and circumstances to
"exist that, if he had exercised reasonable care and dili-
"gence, he would have ascertained its true condition by
"examination and inspection. In such case, it is said that
"he ought to have known its condition, and he is held to
"be as equally liable as if he had known it.

"The testimony also showed that, in the ordinary work
"of unloading, the men were obliged to work during the
"early part of the unloading directly under the ascend-
"ing buckets, and the nature of their employment and
"the requirements of their employers would not permit
"them to stand and watch the ascending bucket until it
"was safely landed upon the platform or its contents
"emptied. Consequently their position was one of dan-
"ger, unless the machinery and appliances for hoisting
"were kept safe. Under these circumstances, I think the
"duty of examination and inspection rested upon the de-
"fendant, and that he would be liable if he knew, or could
"have known by inspection, of the weak, worn and in-
"sufficient condition of the chain, through which any
"injury resulted to the men engaged in unloading the
"vessel."

To the same effect—Johnson *vs.* Richmond Ry., 81 N. Car., 446—a company is responsible for an injury suffered by an employe through a flaw in the rod of a car brake which might have been discovered by an ordinarily careful inspection, the plaintiff having had no reasonable opportunity to inspect.

In some cases, though he may have had actual knowl-

edge, yet when his duties were such as to cause him to divert his attention from the defect and its danger, and the defect was unnecessarily dangerous, the master may not be relieved from responsibility for the consequences to such servant that are caused by such defect.

Kane *vs.* Railway Co., 128 U. S., 94.

Nadau *vs.* White River Co., 76 Wis., 130.

Hannah *vs.* Connecticut River Ry., 154 Mass., 529, where it was said that even if the plaintiff had knowledge of the defect it was not conclusive evidence of a want of due care on his part for him to get into it if that happened while he was in the discharge of his duty and while his attention was directed to the work in which he was engaged.

In the case now before the Court, the deceased had no opportunity to observe the defective condition of the rope. James McLester testified: "We did not have time to examine the rope when a bucket would come up. You might possibly see it, but you dump them just as quick as you can. As soon as the bucket comes up we are supposed to grab the rope and swing it in just as quickly as we can." (Record, p. 28.)

When the deceased—who had been stationed at the hatch for some time past—changed his employment on the morning of March 13, 1896, and took his place on the staging to perform the duties of dumper, pursuant to the orders of the master, he had a right to assume that the appliances furnished him by his master to perform said duties were safe and suitable.

Speed *vs.* Atlantic Ry., 71 Mo., 303.

Ft. Wayne *vs.* Gildersleeve, 33 Mich., 133.
Cone *vs.* Delaware Ry., 81 N. Y., 206.
Bradbury *vs.* Goodman, 108 Ind., 286.

And such obligation, resting upon the master, to furnish safe appliances, could not be delegated so as to escape liability.

Magee *vs.* N. P. C. Ry. Co., 78 Cal., 437.
Beeson *vs.* Green Mtn. Co., 57 Cal., 29.
Illinois Cent. Ry. *vs.* Welsh, 52 Ill., 183.
Kain *vs.* Smith, 89 N. Y., 375.
McNamara *vs.* McDonough, 102 Cal., 575.

III.

It was error for the Court to charge that the carelessness or negligence of a co-employe in the same general business, in failing to remedy the defective condition of the tub, was not the negligence of the master. (Record, p. 71.)

Under the foregoing authorities it is clearly shown that the duty to furnish, inspect and repair machinery and appliances is a personal, positive duty imposed by law upon the master. If the duty is delegated to a servant, *no matter what his grade or rank in the general service* of the master, the servant becomes for such purpose the alter ego of the master. His act is the master's act; his failure is the master's failure.

Indiana Car Co. *vs.* Parker, 100 Ind., 182.
Wheeler *vs.* Wason Co., 135 Mass., 294.
McKinney on Fed. Servants, Secs. 39, 40.

Finkelstein *vs.* N. Y. C., etc., Ry., 41 Hun., 34.
Moore *vs.* Wabash, etc., Ry., 85 Mo., 588.
Doughty *vs.* Penobscot Co., 76 Me., 143.
Chicago, etc., Ry. *vs.* Ross, 112 U. S., 377.
Mullan *vs.* Phila., etc., Co., 78 Pa. St., 25.
Gunter *vs.* Graniteville, etc., Co., 18 S. C., 262.
Crispin *vs.* Babbitt, 81 N. Y., 516.
Flike *vs.* Boston, etc., R. R., 53 N. Y., 549.
Ford *vs.* Fitchburg R. R., 110 Mass., 240.
McKune *vs.* California, etc., Ry., 66 Cal., 302.
Brown *vs.* Sennett, 68 Cal., 225.
Daves *vs.* Southern Pac. Co., 98 Cal., 21.
Elledge *vs.* Railway Co., 100 Cal., 282.
7 A. & E. Ency of L., 824.

IV.

The Court erred in refusing to charge the jury as follows:

"That it is the duty of the master not only to furnish "safe appliances, but that that duty is a continuing one; "that it is his duty to see that at all times those appli- "ances are kept in reasonably safe condition and that he "is bound to make a proper inspection of those appli- "ances, and that if he fails to make that inspection he is "guilty of neglect; and that where a defect would be "apparent upon a reasonable inspection, and it is allowed "to continue, it is presumed that no inspection is made, "and the master is liable." (Record, p. 74.)

In addition to the authorities cited above, we cite Depper *vs.* Railway Co., 36 Iowa, 52, and Baldwin *vs.* Railway,

68 Iowa, 37: If the defect had existed for a length of time, knowledge may be presumed from this fact alone.

For th foregoing reasons we respectfully submit that the judgment in this case should be reversed.

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No. 393.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY AGNES RYAN and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by their Guardian *ad litem* MARY AGNES RYAN,

Plaintiffs in Error,

vs.

C. J. SMITH, as Receiver, etc., of the Oregon Improvement Company, a Corporation,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

SIDNEY V. SMITH,

Attorney for Defendant in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MARY AGNES RYAN and CHARLES RYAN, JR., a Minor, and MARY RYAN, a Minor, by MARY AGNES RYAN,
Plaintiffs in Error,

vs.

C. J. SMITH, Receiver of the Oregon Improvement Company, a Corporation,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

The first eleven specifications of error relate to rulings of the trial court upon the admissibility of evidence. As nothing is said about these rulings in the argument for plaintiffs in error, it is to be presumed that the objections to them are now waived.

The case stands, then, on the criticisms of the counsel for the plaintiffs upon portions of the charge to the jury appearing on pages 43, 45, 48 and 52 of the

Record. These criticisms are put by counsel under three heads, but upon analysis seem really to be presentable under only two, namely that the court erred in instructing, substantially, that the accident to Ryan was caused either by his own negligence, or by that of his fellow servants.

Strictly speaking, the court made no such absolute instruction, but, with ample explanation, left it to the jury to decide whether, under all the circumstances, and considering the nature and course of the business and work in which Ryan was engaged, the duty of keeping the tails in order did not belong to either Ryan or his fellow servants, and whether, in the light of the law laid down by the court in that respect, the accident was not the result of negligence in the performance of that duty, either on the part of Ryan himself or of his co-workers. All through the instructions appeared the opinion of the court that, under some circumstances, it is legally possible for an employer to devolve upon his workmen the duty of keeping their apparatus in repair, and that when, in a particular case, he has done this, neglect as to that duty is not attributable to the master, but to those persons upon whom the duty has been devolved. The argument for the plaintiff in error is an attempt to show that the master can in no case delegate to his workmen his duty of keeping apparatus in repair, so as to escape his own responsibility, and this, I apprehend, upon the ultimate analysis, is the only question before the court on this appeal, as, if it be determined that the master could under the circumstances of this

case cast upon his servants the duty of keeping the tails in repair, it can make no difference whether the neglect to perform this duty was that of Ryan or the other workmen. In either case the fault was not that of the defendant.

The proposition for which the defendant in this case contends is that, while, as a general rule of law, it is the master's duty to keep apparatus in repair, the nature of the business or work may be such as to throw the duty of repair upon the servant himself, as a part and in the course of his employment, and that to such a case the general rule does not apply.

With the general rule, as stated by the plaintiffs, or with the authorities cited by their counsel in its support, we have no quarrel, but we insist that, like all other principles of law, it has its qualifications and modifications, growing out of the varying circumstances of different cases, and necessary to fit it to the results of "reason and experience."

An examination of the authorities cited by plaintiffs' counsel will disclose that they are applications of the familiar rule, that if an employer delegate to another the performance of his duty of keeping apparatus in repair, that other stands in the place of and represents his principal, his negligence is the negligence of the principal, and, as to the duty of repair, he is not ordinarily the fellow servant of other employees who may be injured by his neglect. These decisions were all given in cases where the injured employee, though engaged in the use of, was not charged with the

duty of repairing, the apparatus, and where the person to whom the master had delegated that duty was held for that reason not to be, as to that duty, the fellow servant of the injured employee. The brakeman, for intance who is injured by reason of the defective condition of a car, is not charged with the duty of repairing the car; and the car-builder, or master mechanic,or car, inspector is charged with that duty by and in the place of the railroad company, and is not, as to this duty, the brakeman's fellow servant. But how, if the injured employee has himself been charged by the master or by the custom or nature of the business, with the care and repair of the apparatus? Or how, if the injured employee is one of several others to whom the duty of repairing has been delegated by the master or the custom or nature of the business, and his injury has been caused by the neglect of some of his co-employees in that duty? To these questions the cases cited give no answer.

That the rule as to the impossibility of the master's delegating his duty of repair must be qualified and relaxed when that duty concerns defects in the apparatus which may be easily remedied by the workman himself, and that, as to such repairs, the workmen are fellow servants, is abundantly sustained by authority.

Cregan *vs.* Marston, 126 N. Y., 568.
Harley *vs.* B. C. M. Co., 142 N. Y. 31.
McCampbell *vs.* C. S. Co., 144 N. Y., 552.
Kimmer *vs.* Weber, 151 N. Y., 417.
Burns *vs.* Sennett, 99 Cal., 368.

R. R. Co. *vs.* Sewell, 46 Illinois, 100.
Noyes *vs.* Wood, 102 Cal., 392.
Stroble *vs.* R. R. Co., 70 Iowa, 558.
Bailey on Master's Liability, pp. 33, 169.
McKinney on Fellow Servants, § 36.

We shall not trouble the court with citations from these authorities but content ourselves with assuring the court that a perusal of them, and especially a reading of Cregan *vs.* Marston, will demonstrate that the rule relied on by the plaintiffs in error has no application to such repairs as can and ought to be made by the workman himself. There are some defects in apparatus, which, if the workmen notice them, he should at once report to his employer, so that they may be repaired by the proper persons. There are other defects, so simple, so easily remedied, so peculiarly within the observation and control of the workman himself, that he should himself immediately rectify them, and cannot shield himself from his own negligence in failing to do so by invoking the duty of the master to keep his apparatus in repair. The brakeman must see that his brake is constantly in order, the stevedore must look to his planks and ropes and pulleys, the painter must erect his own staging and assure himself of its strength, the machinist must splice his own belt when it needs splicing. And, while it is often true that the repair of an apparatus and its use are confided to different sets of workmen, so separated from each other in their duties that they are not to be looked upon as fellow-servants,

it is equally true that the master may cast the duty of repair and of operation upon one set of servants, who thus become, as to all their duties, both of repair and operation, fellow servants with each other.

"Whether the employment of a particular class of servants embraces both the setting up of machinery for use and the using of it when so set up is a question of fact to be determined by the evidence. There manifestly is no legal principle standing in the way of an employer's committing to the same body of employees the business of setting up or even of constructing the machinery with which the business of the employer is to be carried on and of using such machinery in carrying on such business. It is a well known fact that in many manufacturing establishments as well as in divers other lines of employment the ordinary employee is expected and required to set up, adjust, repair or even manufacture the tools, implements, and machinery with which their work is done. In such case there can be no doubt that setting up and adjusting the machinery and using it are parts of the same employment and the person doing one is a fellow servant with him who does the other. The employer, may, at his pleasure, divide these species of service into two departments or combine them in one. Where they are divided and committed to distinct bodies of servants undoubtedly an injury to a servant of one class resulting from negligence of the servant of the other class entitles the servant injured to invoke the doctrine of *respondeat superior*. Whether

in any given case the two species of servants form two departments or one depends upon whether the same servants are employed by the master to perform both lines of service and so becomes a question of fact and not of law."

Holton *vs.* Daly, 4 Ill. App. 25.

"The evidence tends to show that the machinery was in charge of an employee who was the engineer and machinist of the manufactory. His duty required him to run the engine and keep the saw and attachments and other machinery in proper order and, in case any of the machinery was broken or became defective, to repair it. The evidence tended to further show that the injury resulted from a defective and worn out rope supporting a weight intended to keep the saw in place, which broke, permitting the saw to fly forward and strike the hand of plaintiff. It is the rule of this Court that an employee cannot, in an action against his employer, recover for the negligence of a co-employee engaged in prosecution of the common business. But this rule does not extend to an employee who is charged with no other duty than to inspect the machinery in the operation of which the injury occurs. But the engineer, it will be seen from the statement of the evidence just made, was not confined by his duty to the mere inspection of the machinery. He was in charge, was required to see that it was in good condition, and to repair it when broken or defective, and these duties were not separated from the operation of the machinery. The

engineer and plaintiff together operated it. The engine furnished the motive power propelling the saw, which did the work of sawing, the very purpose for which both engine and saw were used. The saw could not be operated without the engine. The engineer was engaged in operating the saw. He was therefore, a co-employee of plaintiff in the common business of both."

Thielman *vs.* Moeller, 73 Iowa, 108.

The evidence in the case at bar was to the effect that Ryan came to his death by the giving way of an improperly and carelessly spliced rope or tail, hung to the side of a coal tub to enable the dumpers to pull the tub towards them in the operation of unloading coal into the hold of a ship. The defendant, like the defendants in Cregan *vs.* Marston, 126 N. Y., 570, and Harley *vs.* B. C. M. Co., 142 N. Y., 37, provided and kept on hand in a convenient place the rope necessary for the making of these tails (Record, pp. 26, 33). It was the custom for the dumpers, including Ryan himself, to make and splice the tails and put them on the tubs for themselves; the defect in the splicing of the tail in question was obvious. To this state of facts the rule of the cases above cited is precisely applicable. Ryan must be held to have seen, felt, and known the condition of the splice; it was his duty to remedy it for himself at once; if the defect in the splice was due to the negligence of one of the other dumpers, such neglect was not that of the defendant, but of one of Ryan's fellow servants upon whom, with himself and

like himself, the custom of the business had cast the duty of keeping the tails constantly and instantly in good repair. In every view of the subject, the instructions complained of were fully within the law.

Respectfully submitted,

SIDNEY V. SMITH,

Attorney for Defendant in Error.

No. 398.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE SOUTHERN PACIFIC RAILROAD COMPANY,

Appellant,

vs.

OTTO GROECK AND C. S. MERRILL, JR.,

Appellees.

TRANSCRIPT OF RECORD.

Appeal from the Circuit Court of the United States for the Southern District of California.

INDEX.

Citation.

United States of America,
Southern District of California. }

To Otto Groeck and C. S. Merrill, Jr., Greeting:

The Southern Pacific Railroad Company having, on this day, been granted an order of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the decree entered on June 28th, 1897, in suit No. 347 in the Circuit Court of the United States for the Southern District of California, brought by the said Company against you; and its bond on appeal having been this day filed and approved:

You are hereby cited and admonished to be and appear before the said Circuit Court of Appeals, at San Francisco, California, on September 21st, 1897, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

Given under my hand, at Los Angeles, in the said District, on August 24th, 1897.

ROSS,
Circuit Judge.

Served on me, August 30th, 1897.

W. B. WALLACE,
Attorney for Otto Groeck and C. S. Merrill, Jr.

[Endorsed]: Citation. Filed Sept. 3, 1897. Wm. M. Vandyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	In Equity.

Amended Bill of Complaint.

The Amended Bill of Complaint of the Southern Pacific Railroad Company, Plaintiff, against Otto Groeck and C. S. Merrill, Jr., Defendants. Filed by leave of the Court.

To the Honorable Judges of the Circuit Court of the United States for the Ninth Circuit, Southern District of California:

Your orator, the Southern Pacific Railroad Company, complaining says:

I.

That your orator is, and at all the times hereinafter mentioned, was a private corporation, duly incorporated by and in virtue of the general laws of the State of California, and a citizen of said State ; and Otto Groeck and C. S. Merrill, Jr., Defendants. Each is a citizen of the State of California and inhabitant of the Southern District of California.

II.

The matter in dispute in this suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and, as will be hereinafter shown, arises under the laws of the United States.

III.

By an Act of the Congress of the United States, approved July 27th, 1866, entitled "An Act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific Coast," your orator was authorized and empowered to connect with the Atlantic and Pacific Railroad at such point near the boundary line of the State of California as they should deem most suitable for a railroad line to San Francisco, and to construct a railroad from such point to the city of San Francisco.

To aid in the construction of the said railroad, the said Act of the Congress made a grant to your orator of every alternate section of public land, not mineral,

designated by odd numbers, to the amount of ten alternate sections of land per mile on each side of said railroad when constructed. And in this behalf the said Act further provided that, whenever prior to said time, any of the said sections were granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands should be selected by your orator in lieu thereof, under the direction of the Secretary of the Interior, from the odd-numbered sections not more than ten miles beyond the limits of the first mentioned odd-numbered sections. The said Act, among other matters, further provided (by Section 6 thereof) that the President of the United States should cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route should be fixed, and as fast as might be required by the construction of said railroad; and that the odd sections of land thereby granted should not be liable to sale or entry, or pre-emption, before or after they were surveyed, except by your orator, as provided in the said Act.

Your orator refers to the said Act of the Congress, as printed in the XIV U. S. Statutes at Large, at page 292 and following; and makes the said Act, and the whole thereof, a part of this Bill of Complaint.

The Act of the Congress, approved July 25th, 1868, entitled "An Act to Extend the Time for the Construction of the Southern Pacific Railroad in the State of California," provided that your orator have until July 1st, 1870, for the construction of the first thirty

miles of said railroad; that it be required to construct at least twenty miles every year thereafter, and the whole line of road within the time then provided by law—namely, on or before July 4th, 1878.

IV.

On December 27th, 1866, your orator duly accepted the terms, conditions and impositions of the said Act of July 27th, 1866, and deposited such acceptance in the office of the Secretary of the Interior; which acceptance was in writing, under its corporate seal, and was duly executed pursuant to the direction of its board of directors, theretofore made.

V.

On or before January 3d, 1867, your orator duly filed the general route of the entire line of the railroad which it was authorized by the said Act of July 27th, 1866, to construct, and on January 3d, 1867, the line of the said road was designated by a plat thereof filed on that day in the office of the Commissioner of the General Land Office. The said general route, plat and designation of line, were duly approved and accepted by the Secretary of the Interior and the Commissioner of the General Land Office; and, on March 22d, 1867, the Commissioner of the General Land Office, by direction of the Secretary of the Interior, dated March 19th, 1867, withdrew the odd-numbered sections of land within thirty miles of the railroad line shown upon the said plat, from sale or

location, pre-emption or homestead entry. A copy of the said order of March 22d, 1867, is hereto attached, marked "Exhibit A," and made a part of this Amended Bill.

The said order of withdrawal has ever since continued and still continues in full force and effect, except in so far as, if at all, the same may have been affected by orders of the Secretary of the Interior dated, respectively, November 2d, 1869, directing restoration of the said lands, and August 15th, 1887, directing restoration of all lands withdrawn and held for indemnity purposes under the said grant to your orator. Your orator is advised and believes, and therefore says, that neither the said order of November 2d, 1869, nor the said order of August 15th, 1887, in anywise affected the provisions of the Sixth Section of the said Act of July 27th, 1866; and that the said orders did not, and could not, make the said lands in anywise liable to sale, entry or pre-emption, except by your orator.

The said order of November 2d, 1869, directing restoration of the said lands, was indefinitely suspended by the order of the Secretary of the Interior, dated December 15th, 1869.

On June 28th, 1870, a Joint Resolution was adopted by the Congress of the United States, entitled "Joint Resolution Concerning the Southern Pacific Railroad of California," approved June 28th, 1870; which Joint Resolution is printed in the 16th Statute at Large,

page 382, and is hereby referred to and made a part of this Amended Bill.

On July 26th, 1870, and July 29th, 1870, respectively, the Secretary of the Interior and the Commissioner of the General Land Office ordered and directed that the order of the Commissioner of the General Land Office of March 22d, 1867, hereinbefore referred to, should be respected; a copy of each of which orders is hereto attached, marked respectively, "Exhibit B" and "Exhibit C," and made a part of this Amended Bill.

VI.

Your orator constructed the first section of its railroad, extending from San Jose, in a southerly direction, through the town of Gilroy, to a point distant more than thirty miles from San Jose, prior to July 1st, 1870; and, within the next year thereafter, constructed the twenty mile section of said railroad extending from the last mentioned point to Tres Pinos. Thereafter, and prior to July 4th, 1878, your orator constructed that portion of its railroad extending from Huron to Mojave, a distance of one hundred and eighty-two miles; and constructed its railroad extending from Mohave to the Needles, where it connects with the Atlantic and Pacific Railroad, in several sections, and at different times, subsequent to July 4th, 1878, and prior to the year 1885; and constructed the section of said railroad which extends from Huron westerly to Alcalde during the year 1888.

All of said railroad was constructed along the line designated therefor on the said plat of general route, filed January 3d, 1867.

All of the said railroad was so constructed and equipped in a good, substantial and workmanlike manner, in all respects as required by the said Acts of the Congress. Commissioners, duly appointed by the President of the United States, examined the said railroad after it was completed in sections as aforesaid, and duly reported to the President of the United States that all of the said railroad had been completed in a good, substantial and workmanlike manner, in all respects as required by the said Acts of the Congress.

The President of the United States duly accepted and approved the said reports, as follows: Of the first thirty-miles section of railroad, extending from San Jose through Gilroy, on August 7th, 1871; of the second section of railroad, extending from near Gilroy to Tres Pinos, on October 26th, 1871; of the several sections extending from Huron to Mojave, at various dates between October 26th, 1871, and January 31st, 1878; and the section of railroad extending from Huron westerly to Alcalde, on November 8th, 1889.

VII.

Your orator filed plats in the General Land Office and Department of the Interior, showing the line of its said railroad as definitely located and constructed, on the following dates: Of the first thirty-miles section

of railroad, extending from San Jose through Gilroy, on August 7th, 1871; of the section of railroad extending from near Gilroy to Tres Pinos, on October 26th, 1871; of the several sections of railroad extending from Huron to Mojave, at various dates between October 26th, 1871, and January 31st, 1878; of the several sections of railroad extending from Mojave to the Needles, at various dates between January 31st, 1878, and December 31st, 1884; and of the section of railroad extending from Huron westerly to Alcalde, on April 2d, 1889.

VIII.

The east half of the south-west quarter of Section 19, in Township 8 South, Range 1 East, Mount Diablo Base and Meridian, is part of an odd-numbered section, within twenty miles, on the west side, of the first section of the said railroad, which extends from San Jose through Gilroy. The said tract was granted to the Central Pacific Railroad Company of California, by the Act of the Congress of the United States approved July 1st, 1862, entitled "An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for Postal, Military and other purposes," prior to the time when your orator's railroad was designated by a plat thereof filed in the office of the Commissioner of the General Land Office; which Act is printed in the XII U. S. Statute at Large, at page 489 and following.

IX.

The south half of the south-east quarter of Section 17, in Township 24 South, Range 17 East, Mount Diablo Base and Meridian, is situated in Kings County, and within the Southern District of California.

The said tract is part of an odd-numbered section, distant more than twenty miles from, but lying within thirty miles of, the line of road designated on the said plat thereof filed January 3d, 1867, and the said road as definitely located and constructed; and is opposite to and co-terminous with the section of said railroad which extends from Huron westerly to Alcalde.

At the time of the passage of the said Act of July 27th, 1866, the tract of land last described was vacant and unappropriated public land of the United States, not mineral, to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emptions or other claims or rights; and the said land has ever since so remained, excepting only as it has been affected by the laws of Congress and the acts of the parties in this Amended Bill mentioned and referred to.

Each of the tracts of land hereinbefore particularly described is situated within the United States district of lands subject of sale and proceedings at Visalia, in the State of California.

X.

On July 13th, 1891, your orator filed its Indemnity List, No. 43, in the Land Office of the United States at Visalia, describing the said south half of the said south-east quarter of Section 17, in Township 24 South, Range 17 East, Mount Diablo Base and Meridian, as selected by your orator in lieu of the said east half of the south-west quarter of Section 19, in Township 8 South, Range 1 East, Mount Diablo Base and Meridian. The said list was in the form, and accompanied by the certificates, affidavits and fees required by law and the rules and regulations prescribed by the Secretary of the Interior and Commissioner of the General Land Office of the United States; and, by the filing of the said list, accompanied as aforesaid, your orator did, on July 13th, 1891, duly select, under the direction of the Secretary of the Interior, the said south half of the south-east quarter of Section 17, in Township 24 South, Range 17 East, in virtue of the rights aforesaid, granted to it by the said Act of July 27th, 1866. That on July 13th, 1891, your orator had not, nor has it since, selected or received lands to the extent or amount earned and acquired by it, in virtue of the said Act of Congress.

By and in virtue of the grant made by the said Act of July 27th, 1866, the provisions of the said Act, and the matters and things hereinbefore set forth, on July 13th, 1891, your orator became the owner of, and entitled to the issue from the United States to it of a

patent for the south half of the south-east quarter of the said Section 17, and thereafter the holder of the legal title to the said land, whoever it might be, held the same in trust for your orator, and under the obligation to convey the same to it upon demand; and your orator at that time, and continuously thereafter until the commencement of this suit, duly demanded the issuance of such patent from the United States to it. But, notwithstanding such right, title and demand, the Commissioner of the General Land Office, the Secretary of the Interior, and the President of the United States, each has, and all have, refused to issue a patent conveying the said land to your orator.

XI.

Notwithstanding the premises, the United States, on or about April 11th, 1890, in disregard of the rights in respect of said land theretofore acquired by your orator, executed and delivered its patent, conveying the legal title to said land to the said defendant, Otto Groeck; and thereafter, and on or about April 11th, 1891, the said Otto Groeck executed a deed, bearing that date, conveying the same to the defendant, C. S. Merrill, Jr.; and the defendants claim, and each of them claims, that the said patent, so issued by the United States, conveyed the said land in fee simple to the defendant, Otto Groeck, free from any trust, in favor of your orator, and that the said deed from the said Otto Groeck to the said C. S. Merrill, Jr., conveyed the said land in fee simple to the said C. S. Merrill, Jr., free from any

trust in favor of your orator. But, as your orator is informed and believes, such claims are made by the said defendants upon the following grounds and allegations, and none others, that is to say: That on or about September 17th, 1885, the said defendant, Groeck, filed, in the United States Land Office at Visalia, his pre-emption declaratory statement for the said land, alleging therein that he settled on said land September 2d, 1885, as a pre-emptor, and that, on June 7th, 1886, the said Groeck was permitted to, and did, make proof, in the United States Land Office at Visalia, that he was a qualified pre-emptor at the time he settled upon the said lands, that he settled thereon September 2d, 1885, and improved the land and resided on it continuously from the time of his settlement to the date of the proof, and that on the day when said proof was made he was permitted to make pre-emption, entry and payment for the said land, and that such proceedings were thereafter had in the Visalia Land Office, and in the General Land Office, and in the Department of the Interior of the United States, as resulted in the issue of the patent to said Groeck, above set forth.

But your orator alleges that, even if such allegations so made on behalf of the defendants should be found to be in any respect correct and true, the same did not in anywise authorize or justify the issue of said patent to said Groeck; that if the said Groeck did, in fact, settle upon said land as alleged, or file any pre-emption declaratory statement for the said land, or make any such proofs as alleged, or was per-

mitted to or did make pre-emption, entry or payment for the said land, the fact is, that at all such times said land, and the whole thereof, was withdrawn from sale or location, pre-emption or homestead entry, under and by virtue of the order of March 22d, 1867, hereinbefore referred to, and subsequent orders confirming or reinstating the same; and that said land has not, at any time since the 3d day of January, 1867, or, in any event, since the 28th day of June, 1870, been in anywise liable to sale, entry or pre-emption; but sale, entry and pre-emption thereof has been expressly prohibited by law, which facts were well known to the said Groeck at and at all times since the date of any settlement, or alleged settlement, by him upon the said lands, and by the said Merrill at and prior to the time of the conveyance of said land to him by the said Groeck; and the said Groeck and Merrill acquired the title to said land only in trust for your orator, and subject to the obligation to convey to it on demand.

XII.

After the said patent issued from the United States, and prior to the said pretended conveyance by Otto Groeck to C. S. Merrill, Jr., your orator requested the defendant, Otto Groeck, to convey the title which he had received to the said land, to it; and thereafter, and prior to the commencement of this suit, requested each of the defendants to convey such title to it; but each of the defendants has, at all times, refused so to do.

XIII.

Your orator further says that it is the true owner of the title to the south half of the south-east quarter of Section 17, in Township 24 South, Range 17 East, Mount Diablo Base and Meridian; and that the aforesaid patent conveying the same to the defendant, Otto Groeck, was wrongfully issued, without authority of law, in disregard of your orator's rights in the premises. That the said patent conveyed the legal title to the said land to the defendant, Otto Groeck, but in trust, however, for your orator, of which the defendant, C. S. Merrill, Jr., had full knowledge at the time he received said Deed pretending to convey title to said land to him; and that the defendants should convey to your orator the title so held by them in and to the said land, free of encumbrances.

That your orator is remediless in the premises, at and by the strict rules of the common law, and can only have relief in a Court of Equity, where matters of this nature are properly cognizable.

To the end, therefore, that the said Otto Groeck and C. S. Merrill, Jr., and each of them, may full and perfect answer make to all and singular the facts and matters herein set forth (but not upon oath or affirmation, the benefit of which is waived by your orator); and that it may be declared that your orator is the rightful owner of the said land, and that the defendants hold the legal title thereto in trust for your orator; and that it be decreed that the defendants convey such legal title

free of all encumbrances made, done, or suffered by them or either of them, to your orator; and that your orator may have such further or other relief as the nature of this case may require, and to your Honors shall seem meet.

May it please your Honors to grant unto your orator a Writ of Subpœna, to be directed to the said Otto Groeck and C. S. Merrill, Jr., the defendants herein, thereby commanding them and each of them, at a certain time, and under a certain penalty therein to be limited, to personally appear before your Honors, and then and there full, true, direct and perfect answer make to all and singular the premises; and to stand to, perform and abide such further order, direction and decree therein as to your Honors shall seem agreeable to equity and good conscience.

WM. SINGER, JR.,
Attorney for the Plaintiff.

WM. F. HERRIN,
Counsel for the Plaintiff.

"Exhibit A."

Department of the Interior,
General Land Office,
March 22nd, 1867.

Register and Receiver,
Visalia, Cal.

Gentlemen:

The Secretary of the Interior has transmitted to this office a map of the designated line of route of the South-

ern Pacific Railroad of California, and directed the withdrawal of the lands granted thereto under the Act of 27 July, 1866—pamphlet laws 1866, page 299. The grant to this road is found in the 18th section of the above Act; by that section this Company is granted every *alternate* or *odd* numbered section of public land for *10 sections* in width on each side of the line of route and indemnity for lands, sold, reserved or otherwise appropriated, within the grant from the alternate odd sections of unappropriated public land not "more than *10 miles* beyond the limits of the granted sections." The limits of the *grant* then are *20* miles on each side of the road and of the *indemnity 30* miles on each side.

In compliance with the Secretary's instructions I herewith enclose a diagram map, having noted thereon that part of the line of route within the *20* and *30* mile limits which fall within the limits of your district, and you are hereby directed to withdraw from sale or location Pre-emption or Homestead entry *all the* odd sections within said limits, and no entries will be allowed thereon after the receipt of this order *except where bona fide pre-emption claims have attached prior to that time.* The even sections within the twenty limits will, by virtue of the Act of March 3rd, 1853, be increased to $2.50 per acre, and subject to the provisions of the Pre-emption and Homestead laws at *that price*, *except where pre-emption rights may have attached prior to this withdrawal;* in such cases then parties may prove up and pay for their claims *at the price they were held on the*

date of settlement. The even sections within the 20 miles *will not* be subject to private entry until duly offered at the increased price.

By the 6th section of the Act, the provisions of which are extended to the South Pacific road by the 18th section, the unsurveyed lands within 40 miles on each side of the line of route are directed to be surveyed, and the odd sections of land *granted* by the Act "shall not be liable to sale or entry" or pre-emption *before or after they are surveyed*, "except by said Company as provided in this Act;" therefore as plats of surveys *within the limits of the grants* may be filed in your office, you will immediately withdraw the *odd*-sections from pre-emption or entry of any kind and hold the same for the benefit of the road.

This order will take effect from the date of its reception, and you will please to acknowledge the date of its receipt by you.

Respectfully,

Your obdt. Svt.,

JOS. S. WILSON,

Commissioner.

Also the Reg. and Rec. at Stockton, Cal., and San Francisco, Cal.

"Exhibit B."

Department of the Interior,
Washington, D. C., July 26, 1870.

Sir:

Referring to my letter of the 15th of December last, directing you to suspend, until further advised by this Department, all action under my decision of November 2nd and 11th, 1869, ordering the restoration of lands withdrawn on account of the Southern Pacific Railroad Company of California, I have now to inform you that by a joint resolution of Congress, approved June 28th, 1870, the said Company are authorized to construct their road and telegraph line, as near as may be, on the route indicated by the map filed in this Department January 3, 1867, and will, upon constructing their road and telegraph line on that route, in compliance with the provisions of the Act of July 27, 1866, be entitled to patents for the granted lands.

You will advise the proper local officers of this legislation, that the reservation of 1867, on account of the Company, may be respected.

Very respectfully,

Your obedient servant,

J. D. COX,
Secretary.

Hon. J. S. WILSON,
Commissioner of the General Land Office.

"Exhibit C."

Department of the Interior,
General Land Office,
July 29, 1870.

Register and Receiver,
San Francisco, Cal.

Gentlemen:

The Secretary of the Interior having informed this office that by a joint resolution (copy herewith inclosed) of Congress, approved June 28, 1870, the Southern Pacific Railroad Company of California are authorized to construct their road and telegraph line, as near as may be, on the route indicated by the map filed in this Department January 3, 1867, a copy of which was sent you on the 22nd of March, 1867, I have to direct that the reservation as indicated in that letter be respected.

Please acknowledge receipt.

Yours respectfully, &c.,

JOS. S. WILSON,
Commissioner.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern District of Cal'a. S. P. R. R. Co. vs. Otto Groeck and C. S. Merrill, Jr. Amended Bill of Complaint. Filed July 6, 1896. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61–2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK and C. S. MERRILL, Jr.,
Respondents.

Plea of Respondents to Amended Bill of Complaint.

The above named respondents, by protestation, not confessing or acknowledging all or any of the matters or things in the said Bill of Complaint mentioned to be true in such manner and form as the same are therein set forth and alleged, do jointly and severally plead thereto, and for plea say:

The respondents allege that on or about the 15th day of August, 1887, the Secretary of the Interior made and entered in his records an order revoking and annuling all orders previously made reserving lands within the indemnity limit of all and every grant made to the Southern Pacific Railroad Company, and restoring them to the public domain, except so far as had theretofore been lawfully selected by said Southern Pacific Railroad Company; that from the date of said Act of Congress of July 27th, 1866, down to July 13th, 1891, the Southern Pacific Railroad Company did not

select, or apply to select, the land involved in this suit as indemnity land under the direction of the Secretary of the Interior, or otherwise.

Respondents further allege, that on the 2nd day of September, 1885, respondent Groeck settled upon said land, and on the 7th day of September, 1885, filed his pre-emption declaratory statement for said land in the United States Land Office, in the Visalia Land District, being the district in which the said land is situated, and thereafter applied to the Register and Receiver of said United States Land Office to make final proof under said pre-emption law and the regulations of the Interior Department, and gave due notice as required by law and the said regulations that he would make such final proof on the 7th day of June, 1886; and on said 7th day of June, 1886, said Groeck was permitted to, and did, make proof in the United States Land Office at Visalia, that he was a qualified pre-emptor at the time he settled upon said land; that he settled thereon September 7th, 1885, and improved the land and resided upon it continuously from the time of his settlement to the date of his proof; and at the time and place of making such proof complainant did not appear and assert any claim to, or interest in, said land; and on the day when said proof was made said respondent was permitted to, and did make, pre-emption entry and payment for said land, and then and there said respondent received from the Register and Receiver of said Land Office a final certificate for said land in due form of law, and thereafter, on or about

April 11th, 1890, a patent was duly and regularly issued by the United States to respondent Groeck for said land; that thereafter complainant, on July 13, 1891, applied to select said land, as alleged in its amended bill, by filing its List No. 43 in the United States Land Office at Visalia, California; but said application was rejected, and the selection of said land by complainant disallowed by the said Register and Receiver, and an appeal from their decision was dismissed by the order of the Commissioner of the General Land Office, and no appeal from the said order of dismissal has been taken by said complainant.

Respondents allege, that by reason of the facts hereinbefore set forth, the issuance to the respondent Groeck of said patent for said land vested in said respondent Groeck a perfect and legal title in fee simple to said land; and, in any event, complainant by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its laches from asserting any claim thereto.

All of which matters and things these respondents aver to be true and plead the same to the said bill, and pray the judgment of this Honorable Court whether they, or either of them, ought to be compelled to make any further or any answer to the said bill.

W. B. WALLACE,
Solicitor for Respondents.

J. H. CALL,
Of Counsel.

I hereby certify that the foregoing plea is in my opinion well founded in point of law.

W. B. WALLACE,
Solicitor for Respondents.

[Endorsed]: No. 347. In the United States Circuit Court, Southern District of California, Ninth Circuit. Southern Pacific Railroad Company, Complainant, vs. Otto Groeck and C. S. Merrill, Jr., Respondents. Plea of Respondents to Amended Bill of Complaint. Service hereof admitted on behalf of Complainant this 15th day of August, 1896, and verification waived. Wm. Singer, Jr., Attorney for Complainant. W. B. Wallace and J. H. Call, Solicitors for Respondents, Visalia, Cal. Filed Aug. 19, 1896. Wm. M. Van Dyke, Clerk, by E. H. Owen, Deputy.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
Complainant,
vs.
OTTO GROECK, et al.,
Defendants.

Opinion on Plea.

To the original bill in this case a demurrer was sustained upon the ground that the bill showed upon its

face such *laches* on the part of the complainant as precluded it from the recovery sought. (Southern Pacific Railroad Co. vs. Groeck, et al, 68 Fed. Rep., 609–617). Leave was, however, given the complainant to amend its bill, and accordingly it filed an amended bill, to which the respondents interposed a plea, which the complainant caused to be set down for argument, and which has been argued, and is now for disposition. For the purpose of disposing of the plea, the Court must assume, without proof on either side, the facts to be as set out in the bill, where not controverted by the plea, and, where so controverted, or inconsistent, to accept as true the contradictory and inconsistent allegations of the plea, together with such additional facts as are therein set out. (United States vs. California Land Co., 148 U. S., 31–39; Farley vs. Kittson, 120 U. S., 304–314; Rhode Island vs. Massachusetts, 14 Pet., 253–258.)

The case as now presented is not, in my opinion, as strong for the complainant as when it was last under consideration. As now presented, it shows that, notwithstanding the grant to the complainant, under which it claims the piece of land in controversy, was made by Congress July 27, 1866, (14 Stats., 292,) and that the complainant, on or before the 3d day of January, 1867, located the general route of the road it was authorized to build by the Act making the grant, and filed with the Secretary of the Interior a map on that day showing the general route of the road as located, which map was accepted by the Secretary, and on the

same day transmitted by him to the Commissioner of the General Land Office, to be filed in that office, which was done on the same day, yet the complainant did nothing towards definitely locating that portion of its road opposite the land in controversy prior to the year 1888, and never attempted to select the land in controversy until December 31, 1891, for which long delay the bill as amended affords no excuse. It appears from the bill as amended that the piece of land in controversy, which is within the indemnity limits of the grant, is opposite that section of the complainant's road extending from Huron westerly to Alcalde, and that that portion of the road was not constructed until the year 1888, and that the complainant never filed a plat in the General Land Office showing the definite location of that portion of its road until April 2, 1889—years after the defendant Groeck went upon the land claiming the right of settlement, and had been allowed by the officers of the Land Department to enter and pay for it, and but little more than one year before the government issued to him his patent therefor. True, the land was not, at the time, subject to Groeck's settlement, for the reason that it then stood withdrawn from such settlement or sale for the benefit of the complainant; but the complainant was then sleeping upon its rights, and continued to sleep upon them until February 11th, 1892, when it commenced this suit. The question, therefore, remains whether the facts alleged do not disclose such *laches* on the part of the complainant as makes it proper for a court of equity

to withhold its aid. A decree in its favor would be, in effect, to hold that the complainant, without any reason or excuse therefor being shown, was entitled to tie the hands of the government (the government being passive and, therefore, consenting) and exclude from all the odd sections within what might prove to be the indemnity limits of its grant, all persons who might seek a settlement thereon for a period extending from the date of its grant, July 27, 1866, until the year 1888, without in any way indicating the definite location of its road—a period of more than twenty-one years—and that it could continue to wait until April 2, 1889, before filing in the office of the Commissioner of the General Land Office a map showing its definite location, and until December 31, 1891, before attempting to exercise its right of selection, and until February 11, 1892, before instituting suit to establish its claim to a piece of land falling within the indemnity limits of its grant, as fixed by the final and definite location of its road, as against one who settled upon it on the 2d day of September, 1885, and for which he was allowed by the officers of the local land office to file his declaratory statement on September 7, 1885, and which he was allowed by the officers of the Land Department to enter and pay for June 7, 1886, and for which the government issued to him its patent April 11, 1890.

The bill as amended shows that the section of the complainant's road opposite the land in controversy was constructed prior to the filing in the General Land Office of a map showing its definite location, but, so far

as appears, nothing whatever was done by the complainant tending to indicate the definite location of that section of the road until the year 1888, during which year it was constructed. The bill as amended does not show that this long delay of the complainant in indicating the definite location of that part of its road opposite the land in controversy was in any respect caused by any failure or neglect on the part of the Government or of any of its officers, nor does it show any excuse for waiting, after the construction of that portion of its road in 1888, until December 31, 1891, before making any attempt to select the piece of land in controversy, nor for waiting until February 11, 1892, before bringing this suit. The fact, as made to appear by the pleadings now before the Court, that the complainant actually constructed its road before filing with the Commissioner of the General Land Office a map showing its definite location, would seem to indicate quite clearly that the complainant treated the map of its general route there filed on the 3rd day of January, 1867, as its map of definite location. At all events, it was the business of the complainant to fix definitely the location of its road, and to indicate that line by a map filed in the General Land Office. Neither the Government nor any other company or individual could do so for the complainant. The delay and neglect in that regard was the delay and neglect of the complainant, and of nobody else. In this aspect of the case, it is unimportant that when Groeck settled upon the land on September 2, 1885, claiming the right to pre-empt it,

the land was not legally open to settlement because withdrawn from such settlement or sale for the benefit of the complainant Company. The fact remains that Groeck did enter upon it under an adverse claim to the complainant, and that his claim was recognized by the officers of the Land Department of the Government, and that, notwithstanding those facts, the complainant continued to sleep upon its rights for more than six and a half years before appealing to the Court for relief—a period considerably longer than that prescribed by the statute of California for the bringing of an action for the recovery of real property. (Code of Civil Procedure of California, Sections 318, 319, 343 and 738.) It is true that the *laches* of which the complainant was guilty prior to Groeck's settlement is no concern of his, and that if the Government was content, no third party has the right to complain, but certainly he is entitled to avail himself of such *laches* as occurred subsequent to the commencement of his adverse claim —a claim which existed uncontested for more than six and a half years. While the statutes of limitations applicable to actions at law do not apply to suits in equity, Courts of equity are governed by the analogy of such statutes. (Norris vs. Haggin, 136 U. S., 386.) "A Court of equity," said Lord Camden, "has always refused its aid to stale demands where the party slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this Court into activity but conscience, good faith and reasonable diligence. Where these are wanting the Court is passive and does

nothing. Laches and neglect are always discountenanced; and therefore, from the beginning of this jurisdiction there was always a limitation to suits in this Court."

This doctrine has been repeatedly recognized and acted on by the Supreme Court. (Curtner vs. United States, 149 U. S., 676; Speidel vs. Henrici, 120 U. S., 377, and cases there cited.)

An order will be entered sustaining the plea with leave to the complainant, if it shall be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty days from this date.

ROSS,
Circuit Judge.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern District of California. The Southern Pacific Railroad Co. vs. Otto Groeck, et al. Opinion on Plea. Filed May 18, 1896. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, for the Southern District of California.

SOUTHERN PACIFIC RAILROAD COMPANY,

vs.

OTTO GROECK, et al.

Opinion on Plea to Second Amended Bill of Complaint.

To the second amended bill of complaint, filed herein July 6, 1896, the defendants interposed a plea, which the complainant caused to be set down for argument, and which was, by the respective parties, submitted upon the same briefs theretofore filed upon the hearing of the plea to the first amended bill.

For the purpose of disposing of the plea so submitted, the Court must assume, without proof on either side, the facts to be as set out in the amended bill, where not controverted by the plea, and where so controverted or inconsistent, to accept as true the contradictory and inconsistent allegations of the plea, together with such additional facts as are therein set out. (Southern Pacific Railroad Company vs. Groeck, et al., 74 Fed. Rep., 585, and cases there cited.)

The case as now presented is substantially the same as when last under consideration. For the reasons given in the opinion then filed, and which is reported

in 74 Fed. Rep., 585, an order will be entered sustaining the plea, with leave to the complainant, if it be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty days from this date.

ROSS,
Circuit Judge.

[Endorsed]: 347. U. S. Circuit Court, Southern District of California. The Southern Pacific Railroad Company vs. Otto Groeck, et al. Opinion on Plea to Second Amended Bill. Filed Jan. 6, 1897. Wm. M. Van Dyke, Clerk.

UNITED STATES OF AMERICA,

Circuit Court of the United States, Ninth Judicial Circuit, Southern District of California.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Complainant, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	In Equity. No. 347.

Decree.

This cause having heretofore been argued and submitted to the Court upon the plea of defendants to the

second amended bill of complaint, and upon consideration thereof the Court having on the 6th day of January, 1897, being a day in the August term, A. D. 1897, of said Circuit Court of the United States for the Southern District of California, sustained said plea with leave to the complainant if it should be so advised, to reply to the plea and take issue in respect to the matters of fact therein alleged, within twenty (20) days, and the complainant having failed and refused so to reply to said plea, and thereafter in open court on this 28th day of June, 1897, being a day in the January term, A. D. 1897, of said Circuit Court of the United States for the Southern District of California, the Court having ordered said bill of complaint dismissed;

Now therefore, it is ordered, adjudged and decreed that the said bill of complaint be and the same hereby is dismissed, and that defendants have and recover of and from complainant, their, defendants' costs taxed at $38.50, and that execution issue therefor after sixty days from date hereof.

Los Angeles, California, June 28, 1897.

ROSS,
Circuit Judge.

Decree entered and recorded June 28th, 1897.

Wm. M. Van Dyke,
Clerk.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern District of California. The Southern Pacific Railroad Company, Complainant, vs. Otto Groeck, et al., Defendants. Decree. Filed June 28, 1897. Wm. M. Van Dyke, Clerk.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	No. 347. In Equity.

Petition for Allowance of Appeal and Supersedeas.

The plaintiff in the above entitled suit, conceiving itself aggrieved by the decree made and entered herein on June 28th, 1897, sustaining the defendants' plea to the plaintiff's second amended bill of complaint, and ordering the said bill dismissed at the plaintiff's costs taxed at $38.50, hereby appeals from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the Assign-

ment of Errors filed herewith; and they pray that their appeal be allowed, and that a transcript of the record, proceedings and papers upon which said decree is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner further prays that, upon its giving a good and sufficient bond to be approved by this Court, all proceedings in this cause and upon said decree may be stayed pending the said appeal.

WM. SINGER, JR.,
Attorney for the Plaintiff.

WM. F. HERRIN,
Counsel for the Plaintiff.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac. Railroad Co. vs. Otto Groeck, et al. Petition for Allowance of Appeal and Supersedeas. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61–2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	No. 347. In Equity.

Assignment of Errors.

The plaintiff, by its counsel and attorney, in connection with its petition on appeal herein, says that the decree in this cause is erroneous and against its just rights, in the following particulars:

I.

The Court erred (*a*) in sustaining the defendants' plea to the plaintiff's second amended bill of complaint, and (*b*) in ordering the said bill of complaint dismissed.

II.

The Court erred in deciding that the plaintiff's second amended bill of complaint discloses such laches on the part of the plaintiff as that a Court of equity should withhold its aid; and herein the Court erred particularly in deciding:

a. That the failure to complete the construction of its railroad from Huron to Alcalde until the year 1888, constituted such laches of the plaintiff; or

b. That the failure of the plaintiff to file a map of the definite location of its railroad, from Huron to Alcalde, with the Commissioner of the General Land Office, prior to April 2nd, 1889, constituted such laches of the plaintiff; or

c. That the failure of the plaintiff to select the lands in controversy prior to December 31st, 1891, constituted such laches of the plaintiff; or

d. That the failure of the plaintiff to bring this suit until February 11th, 1892, constituted such laches.

III.

The Court erred in deciding it to be unimportant that the land in suit was withdrawn from the public lands and reserved to satisfy the plaintiff's grant, at all the times when the defendant Groeck settled upon, filed for, and was permitted to make pre-emption entry of the same.

IV.

The Court erred in deciding that since the date of his settlement upon the lands in suit the defendant Groeck has had the right to complain, or to avail himself, of the plaintiff's neglect, (*a*) to construct its railroad from Huron to Alcalde prior to the year 1888, or

(*b*) to file a map of the definite location of its railroad from Huron to Alcalde, with the Commissioner of the General Land Office, prior to April 2nd, 1889, or (*c*) to select the lands in controversy prior to December 31st, 1891, or (*d*) to bring suit prior to February 11th, 1892.

V.

The Court erred in allowing costs of suit to the defendants against the plaintiff.

Wherefore the plaintiff (appellant) prays that the said decree be reversed, and the said Circuit Court be directed to overrule and deny the defendants' plea to the plaintiff's second amended bill of complaint.

WM. SINGER, JR.,
Attorney for the Plaintiff.

WM. F. HERRIN,
Counsel for the Plaintiff.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac. Railroad Co. vs. Otto Groeck, et al. Assignment of Errors. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61–2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	No. 347. In Equity.

Order Granting Appeal and Supersedeas.

Having considered the plaintiff's petition for the allowance of appeal and supersedeas from the decree made and entered herein on June 28th, 1897, and the assignment of errors filed therewith, on motion of Mr. Wm. Singer, Jr., of counsel for the plaintiff, the appeal is allowed as prayed, upon the plaintiff's giving a bond, to be approved by this Court, in the sum of $500.00; which bond shall operate as a supersedeas from the date of its approval.

ROSS,
Circuit Judge.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac. Railroad Co. vs. Otto Groeck, et al. Order Granting Appeal and Supersedeas. Filed August 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., Rooms 61–2, Union Trust Building, San Francisco, Cal., Attorney for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	No. 347. In Equity.

Bond on Appeal.

We, John D. Bicknell and William Banning, each of Los Angeles, California, are held and firmly bound unto Otto Groeck and C. S. Merrill, Jr., the above named defendants, in the sum of $500.00, to be paid to them, their executors or administrators; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The Southern Pacific Railroad Company, plaintiff above named, has been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and a supersedeas, from the decree entered in the above entitled suit on June 28th, 1897; and the condition of this obligation is, that if the plaintiff Company shall prosecute its said appeal to effect, and answer the costs taxed in the decree appealed from, together with all damages, interest and costs of such appeal and super-

sedeas if it fails to make the said appeal good, then this obligation shall be void—otherwise to remain in full force.

Dated, signed and sealed on August 23d, 1897.

JOHN D. BICKNELL. (Seal.)
WILLIAM BANNING. (Seal.)

State of California, }
County of Los Angeles. } ss.

John D. Bicknell and William Banning being duly sworn, each for himself says: I am one of the sureties to the foregoing bond, and subscribed my name thereto. I am a resident of and freeholder within the Southern District of California, and am worth the sum of $500.00, over and above all my just debts and liabilities, in property situated in said District which is not exempt from execution.

JOHN D. BICKNELL.
WILLIAM BANNING.

Subscribed and sworn to before me on August 23rd, 1897.

(Seal.) R. W. DARBY,
Notary Public in and for Los Angeles Co., State of Cal.

Approved August 24th, 1897.

ROSS,
Circuit Judge.

[Endorsed]: No. 347. U. S. Circuit Court, Ninth Circuit, Southern Dist. of California. Southern Pac.

Railroad Co. vs. Otto Groeck, et al. Bond. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., Rooms 61–2, Union Trust Building, San Francisco, Cal., Atty. for Plaintiff.

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

SOUTHERN PACIFIC RAILROAD COMPANY, Plaintiff, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	No. 347. In Equity.

Stipulation and Order as to Printing of Transcript.

To save the expense of copying papers and proceedings which are not necessary to a full hearing of the appeal herein, it is agreed that the following papers and documents shall be deemed to constitute a complete record of the above entitled case; and that no other papers need be copied into the transcript of record on appeal:

Plaintiff's second amended bill of complaint (filed on July 6th, 1896); the defendants' plea thereto; the opinion filed on May 18th, 1896; the opinion filed on Janu-

ary 6th, 1897; the decree entered June 28th, 1897; the plaintiff's petition for allowance of appeal and supersedeas; the plaintiff's assignment of errors; the order granting the appeal and supersedeas; the bond on appeal; this stipulation, and such order as may be made upon it; and the citation which may be issued herein.

WM. SINGER, JR.,
Attorney for the Plaintiff.
W. B. WALLACE,
Attorney for the Defendants.

It is ordered that a transcript of the record in the above entitled suit be made in accordance with the foregoing stipulation, and that the clerk of this Court forward such transcript, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit.

ROSS,
Circuit Judge.

[Endorsed]: No. 347. In the U. S. Circuit Court, Ninth Circuit, Southern District of California. Southern Pacific Railroad Co. vs. Otto Groeck, et al. Stipulation and Order. Filed Aug. 24, 1897. Wm. M. Van Dyke, Clerk. Wm. Singer, Jr., rooms 61–2, Union Trust Building, San Francisco, Cal., Atty. for Defts.

In the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

THE SOUTHERN PACIFIC RAILROAD COMPANY, Complainant, vs. OTTO GROECK and C. S. MERRILL, Jr., Defendants.	No. 347.

Clerk's Certificate to Transcript.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing forty-one typewritten pages, numbered from 1 to 41, inclusive, and comprised in one volume, to be a full, true and correct copy of the following papers in the above and therein entitled cause, viz: Plaintiff's second amended bill of complaint, filed on July 6th, 1896; the defendants' plea thereto; the opinion filed on May 18th, 1896; the opinion filed on January 6th, 1897; the decree entered June 28th, 1897; the plaintiff's petition for allowance of appeal and supersedeas; the plaintiff's assignment of errors; the order granting the appeal and supersedeas; the bond on appeal; and the stipulation and order made upon it,

filed on August 24th, 1897; and that the same together, under and pursuant to said last mentioned stipulation and order, constitute the transcript of the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, in said cause.

I do further certify that the cost of the foregoing record is $21.\frac{20}{100}$, and that the amount thereof has been paid me by the Southern Pacific Railroad Company, the appellant in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, this 11th day of September, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and twenty-second.

(Seal.) WM. M. VAN DYKE,

Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

[Endorsed]: No. 398. United States Circuit Court of Appeals for the Ninth Circuit. The Southern Pacific Railroad Company, Appellants, vs. Otto Groeck

and C. S. Merrill, Jr., Appellees. Transcript of Record. Appeal from the Circuit Court of the United States for the Southern District of California.

Filed Sept. 14, 1897.

FRANK D. MONCKTON,
Clerk.

By Meredith Sawyer,
Deputy Clerk.

No. 398.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,

Appellant,

VS.

OTTO GROECK AND C. S. MERRILL, JR.,

Appellees.

Appellant's Brief.

WM. F. HERRIN,
JOHN GARBER, and
WM. SINGER, JR.,

Counsel for Appellant.

Filed January FILED *1898.*

JAN 2 6 1898

Clerk.

H. S. CROCKER COMPANY, PRINTERS, S. F.

No. 398.

United States Circuit Court of Appeals,

NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,
Appellant,

vs.

OTTO GROECK AND C. S. MERRILL, JR.,
Appellees.

Appellant's Brief.

On April 11th 1890 the land officers of the United States issued a patent conveying to Otto Groeck the title to eighty acres of land, the equitable right to which the appellant claims was theretofore granted to it by Congress; and C. S. Merrill, Jr. claims some interest in the land under conveyance from Groeck. This suit was brought in February 1892, to right the wrong done by the land officers in patenting appellant's land to Groeck; and the court was asked to decree an implied trust as arising out of the circumstances, and

direct a conveyance from the appellees to the appellant, of the title thus wrongfully taken.

The appellees filed a plea to the appellant's bill, asserting the validity of Groeck's patent as conveying land lawfully entered by him under the pre-emption laws of the United States—and claiming that "in any event complainant (appellant), by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its laches from asserting any claim thereto."

The appellant caused the plea to be set down for argument, and the court sustained the plea. In its opinion the Court found, in effect, that Groeck's patent had been unlawfully issued; but that, solely because of the delays suggested in the plea, the appellant was not entitled to relief.

As this is a re-hearing, and not a technical appeal, the whole case is before the court for review. Coming up as it does on the bill and plea alone, questions of *law only* are presented—for there is, and could be, no controversy as to the facts. A statement of the case, therefore, must necessarily consist of the allegations of the bill and plea.

STATEMENT OF THE CASE.

Briefly stated, in narrative form, the facts material to the present considerations, as set forth in the bill and not controverted in the plea, together with the additional facts set forth in the plea, are as follows :

The congressional Act of July 27th 1866 (14 St. 292) is, by reference, made a part of the bill (Tr. p. 4).

Section 18 of this Act authorized the appellant to construct the railroad which, localized, now extends from San Francisco by way of Mojave to Needles, on the Colorado River. To aid in the construction of this railroad, section 3 of the Act provided :

"That there be, and hereby is, granted * * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of * * * * ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title * * * at the time the line of said railroad is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office ; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the said alternate sections."

Section 6 of the Act provided :

"That the President of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this Act."

The appellant fixed the general route of the railroad contemplated by the Act mentioned, and on January 3rd 1867 filed a map thereof in the office of the Com-

missioner of the General Land Office; and on that day the Commissioner accepted and approved the map, and the route designated by it. On March 22nd 1867 the Commissioner, under direction of the Secretary of the Interior, withdrew the odd sections of land lying within thirty miles of the line of road shown upon that map, from sale or location, pre-emption or homestead entry; but the appellant claims that upon the filing and acceptance of its map, on January 3rd 1867, the same lands were withdrawn by the self-operating force of section 6 of the Act (quoted in the next preceding paragraph), from liability "to sale or entry, or pre-emption"—and that those lands have ever since remained so withdrawn beyond the power of the Land Department to in anywise relieve them from such withdrawal (Tr. pp. 6, 14). On November 2nd 1869 the Secretary of the Interior made an order declaring the withdrawal of March 22nd 1867, revoked; on December 15th 1869 the Secretary suspended his order of November 2nd 1869; on July 26th 1870 the Secretary restored the withdrawal of March 22nd 1867; and on August 15th 1887 the then Secretary declared the withdrawal of March 22nd 1867 revoked as to the "indemnity" sections thereof (Tr. pp. 6, 7).

The appellant commenced to build its railroad during the year 1870, and completed the construction thereof, in several different sections, between that date and the year 1889; the last section thereof, extending from Huron westerly to Alcalde, having been constructed during the year 1888—and all of the road was so constructed along the line designated by the map of gen-

eral route filed, as aforesaid, on January 3rd 1867 (Tr. pp. 7, 8).

The land in suit is opposite to and co-terminous with that section of the road, as shown on the general route map and as constructed, which extends from Huron to Alcalde (constructed, as before said, during the year 1888); is within the "indemnity limits" of the appellant's grant, and not included by any exception therefrom—unless, if at all, it is excepted therefrom by Groeck's pre-emption (Tr. p. 10).

On September 2nd 1885 appellee Groeck settled on the land in suit, and during the same month filed his pre-emption claim for it in the proper land office of the United States. Thereafter Groeck complied with all land office regulations for pre-emptors, and on June 7th 1886 he made pre-emption proof and payment for the land; in pursuance of which, on April 11th 1890 a patent was issued by the Government officers conveying this land to him (Tr. pp. 21, 22). During the year 1891 Groeck conveyed an interest in the land to his co-appellee, Merrill—and they have refused to convey the land to appellant; notwithstanding they were both, at all times, familiar with all the facts set forth in the bill (Tr. pp. 12, 13, 14).

Section 4 of the Act of 1866, under consideration, provides that whenever the company

"Shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same * * * *; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a

good, substantial and workmanlike manner, as in all respects required by this Act, the commissioners shall so report under oath to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and co-terminous with said completed section of said road."

As the appellant's road was constructed, in several sections, such sections were examined by commissioners appointed by the President for that purpose; who duly reported to the President that each of such sections had been completed in a good, substantial and workmanlike manner, in all respects as required by the said Act; and the President accepted and approved the reports. The section of road betweeh Huron and Alcalde (opposite to and co-terminous with which the land in suit lies) was completed during the year 1888, a map of the definite location thereof as constructed was filed with and approved by the Secretary of the Interior on April 2nd 1889, and the President accepted and approved the commissioners' report upon that section on November 8th 1889 (Tr. pp. 7, 8, 9).

On July 13th 1891 the appellant, acting under the direction of the Secretary of the Interior, and complying with all the rules and regulations relating to the subject, selected the land in suit as granted to it by the provisions of the said Act of July 27th 1866; but the Government's officers have ever since refused to issue the appellant a patent for the land, notwithstanding its right thereto and demand therefor; and notwithstanding the appellant has not selected or received land to the

amount granted by the said Act and earned by it (Tr. pp. 11, 12).

POINTS OF CONTENTION.

It is admitted that the appellant has fully performed all the conditions essential to earn the land grant offered by the Act of July 27th 1866; that the land in suit constitutes a part and parcel of the lands granted by the indemnity provisions of that Act; and that upon selection thereof (July 13th 1891) the appellant became fully entitled to a patent for this land, except for the reasons shown in the plea.

The plea says, in effect, that Groeck made preemption settlement and filing for the land in 1885, preemption entry thereof in 1886, and that the patent which was issued in pursuance of that entry conveyed to "Groeck a perfect and legal title in fee simple, to said land." The patent, unquestionably, conveyed but the dry legal title; and whatsoever right (if any) Groeck acquired to the land, passed by virtue of the preemption entry. In other words, the validity of Groeck's patent (except as a conveyance in trust) depends wholly upon the validity of his preemption entry; and unless the land was, at the time, liable to preemption, Groeck's filing and entry were, of course, invalid. The plea, in addition to the assertion of Groeck's preemption, says that "in any event, complainant (appellant) by its long delay in asserting any claim to said land, in filing its map of definite location, and in offering to select said land, is barred by its *laches* from asserting claim thereto."

The decision of the case, therefore, depends upon the true answer to these two questions:

1st. *Was this land lawfully liable (or subject) to the preemption entry of Groeck?*

2nd. *Is the appellant's recovery barred by its delay in* (a) *definitely locating its road*, (b) *selecting the land, or* (c) *bringing this suit?*

Unless the first question is answered negatively, the second question is not reached.

POINTS AND AUTHORITIES.

Was the land lawfully liable to the premption entry of Groeck?

We say the land was not liable to such entry, *because it was then reserved* (a) *by law, and* (b) *by proclamation.*

(a) *The land was reserved by law:*

The right of preemption is extended to every person, qualified under the statute, "who has made, or hereafter makes, a settlement in person on the public lands *subject* to preemption" etc. (Sec. 2259, U. S. R. S.).

Reserved lands are not subject to pre-emption. Section 2258 of the United States Revised Statutes provides:

"The following classes of lands, unless otherwise specifically provided by law, shall not be subject to the rights of pre-emption, to wit: First—Lands included in any *reservation by* any treaty, *law*, or *proclamation of the President* for any purpose."

This land became *reserved* from preemption, as soon as the appellant's map of general route was filed and accepted (January 3rd 1867), by operation of the *law;* for Congress provided by Section 6 of the Act of July 27th 1866,

"That the President of the United States shall cause the lands to be surveyed for forty miles on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad, and the odd sections of land hereby granted *shall not be liable to* sale or entry, or *preemption*, before or after they are surveyed, except by said company, as provided in this Act."

This Act "is a *law* as well as a conveyance, and such effect must be given to it as will carry out the intent of Congress" (**Mo. & Kans. Co. vs. Kans. Pac. Co., 97 U. S. 497**). Section 6 of the Act of July 2nd 1864 (13 St. 365) granting lands to aid in constructing the Northern Pacific's railroad, is identical with the appellant's Act under consideration; and it is generally understood that the appellant's granting Act was copied from the Northern Pacific's. In the case of **Buttz vs. Nor. Pac. Co., 119 U. S. 55-73,** considering the force of section 6 of the Northern Pacific's Act in creating a reservation of lands by the self-operating force of the law, independently of any executive action by the land department, Mr. Justice Field, in delivering the opinion, at pages 71 and 72, said:

"The Act of Congress not only contemplates the filing by the Company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alter-

nate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights; but it also contemplates a preliminary designation of the general route of the road, and the *exclusion from* sale, entry, or *preemption* of the adjoining odd sections within forty miles on each side, *until the definite location is made.* The third (sixth) section declares that after the general route shall be fixed, the President shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or preemption, before or after they are surveyed, except by the Company. The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Department are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. When the general route of the road is thus fixed in good faith, and information thereof given the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, *the law withdraws from* sale or *preemption* the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the Act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases, to formally withdraw them.

It can not be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."

The quotation here made from the Buttz decision was quoted with approval and applied to the construction of section 6 of the appellant's Act (Mr. Justice Brewer delivering the opinion), in the case of the **United States vs. Southern Pac. R. R. Co., 146 U. S.**, at pages 599–600.

Considering this section 6 it was held in the case of the **Southern Pac. R. R. Co. vs. Wiggs, 14 Saw., 574–575,** as follows:

"It does not appear to me that this language is susceptible of more than one construction and that is, that no pre-emption right could be perfected or initiated in the face of that prohibition *till Congress sees fit to withdraw it,* while still in its power to do so, or till the whole claim of the company for deficiency is both ascertained and satisfied."

In the case of the **Southern Pac. R. R. Co. vs. Araiza, 57 Fed. Rep. 104,** after quoting with approval from the Buttz decision (supra), it is said:

"The language of the sixth section of the Acts being in substance, and almost literally, the same, the language of the Supreme Court above quoted is equally applicable to the Act in question here. If, as there held, the *law itself* withdraws from sale or pre-emption the odd section within the limits named in the grant on each side of the line of road represented by the map of general route, manifestly it withdraws from sale or pre-emption the odd sections within the limits named in the grant on each side of the line of road as fixed by the map of definite location. Such being the true construction of the statute itself, as thus

declared by the Supreme Court, it would seem to result necessarily that all the odd sections within the *indemnity*, as well as the primary limits of the grant contained in the Act of July 27th 1866, were *withdrawn from* sale or *pre-emption*, without regard to the order of withdrawal promulgated by the Secretary of the Interior."

To the same effect are the decisions rendered in the cases of the **Southern Pac. R. R. Co. vs. Orton, 16 Saw. 157**; and **Nor. Pac. R. R. Co. vs. Barnes, 51 N. W. Rep. 386.**

In the case of **Wood vs. Beach, 156 U. S. 548–551,** where the lands in suit were within the indemnity limits of the grant construed (see p. 549), Mr. Justice Brewer, delivering the opinion, at pages 550–551, said:

"These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of Congress. Section 4 of the Act granting lands to aid in the construction of what is known as the Missouri, Kansas & Texas Railway (14 St., 290) is as follows:

'Sec. 4. And be it further enacted, that as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this Act.'"

(b) *The land was reserved by proclamation:*

As before said, section 2258 provides that lands "included in any *reservation by* * * * * * law, or *proclamation* of the President," shall not be subject to pre-emption. We have shown under subject heading "(a)" that this land was not subject to Groeck's pre-emption because included in a "reservation by * * * * * * law," independently of any other reservation; and we will now show that the land was

not subject to Groeck's pre-emption because "included in a *reservation by* * * * * * *proclamation of the President.*"

On March 22nd 1867 the Commissioner of the General Land Office withdrew this land from preemption, under direction of the Secretary of the Interior made three days before. The withdrawal thus made (we claim, it must be remembered, that a *legislative withdrawal* by the self-operating force of section 6 of the Act *as a law*, took effect on January 3rd 1867, and has remained in force continuously since, beyond the power of the land officers to affect it by their orders) has continued in force ever since, except in so far as interrupted by orders of the Secretary of the Interior made on November 2nd 1869 revoking it, on December 2nd 1869 and July 26th 1870 setting aside the revocation and restoring the original withdrawal, and on August 15th 1887 (two years after Groeck's filing and one year after his entry) revoking the original withdrawal. So that, in any event, the *executive withdrawal* of this land (as well as the legislative) was in full force from March 22nd 1867 to November 2nd 1869, and from December 11th 1869 to August 15th 1887 (Tr. pp. 6, 7); and as Groeck filed in 1885 and made his preemption entry in 1886 (Tr. 22), this land was *reserved* from liability to preemption when he sought to preempt it, by *executive* as well as *legislative withdrawal*—provided the executive withdrawal, like the legislative, was effective, independently considered.

The withdrawal order made on March 19th 1867 by the Secretary of the Interior, is the legal equivalent,

within the meaning of section 2258 of the Revised Statutes, of a "reservation by * * * * proclamation of the President"; and this land was as effectively withdrawn by the order of the Secretary as if the order had been signed by the President instead of the Secretary. In the case of **Wood vs. Beach, 156 U. S. 548–551,** considering a similar withdrawal made by the Secretary, and construing this section 2258, it was held:

"The fact that the withdrawals were made by order of the Interior Department, and not by proclamation of the President, is immaterial." (And see cases there cited.)

In the case of **Bullard vs. Des Moines R. R. Co., 122 U. S. 167–176,** the Secretary of the Interior, without special authority, made a purely executive order withdrawing a large area of land in Wisconsin from preemption, to preserve the land from other disposition, for the benefit of a railroad grant which it was believed Congress intended to make; but the withdrawal was made *in advance* of any legislation upon the subject, in aid of a grant which, when thereafter made, contained no express provision for withdrawal. Bullard settled on the land after the executive withdrawal, but before the Act was passed granting the land to the railroad company for which it was withdrawn. After finding that the withdrawal order was made on May 18th 1860, the preemption settlement made in May 1862, and the congressional grant made on July 12th 1862, the court, in deciding the case, at page 176, said:

"If the lands were, at the times of these settlements and preemption declarations, effectively withdrawn from

settlement, sale or preemption by the orders of the Department which we have considered, there is an end of the plaintiff's title ; for by that withdrawal or reservation the lands were reserved for another purpose, to which they were ultimately appropriated by the Act of 1862, and no title could be initiated or established, because the land department had no right to grant it. This proposition, which we have fully discussed, will be found supported by the following decisions, which are decisive of the whole controversy." (And then follows a long list of decisions.)

In the case of **Hamblin vs. Western Land Co., 147 U. S. 531–537,** the railroad was definitely fixed, and the land grant identified and finally located so as it could not be changed without the consent of Congress, by the filing and acceptance of a map of definite location on August 30th 1864; but on September 2nd 1869 another map of definite location was filed, along a different route, and the Interior Department, without authority, withdrew the lands along the line of the new route—which withdrawal did, but the other did not, include the land in suit. Speaking of the effectiveness of this unauthorized and *purely executive withdrawal*, the opinion says (at pages 536–537):

"In the first place, whether the location of the line in 1869 was of any validity or not, it was in fact accepted by the Land Department, and by the letters of March 15 and May 11, 1870, the land in controversy was, with others, withdrawn to satisfy the grant as determined by that location, and such a reservation by the Interior Department, it is well settled, operates to withdraw the land from entry under the preemption or homestead laws. Wolcott v. Des Moines Co., 5 Wall. 681; Wolsey v. Chapman, 101 U. S. 755; Bullard v. Des Moines & Fort Dodge Railroad, 122 U. S. 167; United States v. Des Moines Navigation &c. Co., 142 U. S. 510. As therefore the land was so situated

that Hamblin could not make a valid homestead entry, it follows that he is not in a position to question the conveyance of the legal title by the patent from the government."

Is the appellant's recovery barred by its delay in (a) **definitely locating its road,** (b) **selecting the land, or** (c) **bringing this suit?**

Delay, without injury, is not a bar:

Laches is not like limitation, a mere matter of the passage of time, but principally a question as to whether it would be inequitable to enforce the claim because of some change in the condition of the property or relations of the parties, occasioned by the delay (**Galligher v. Caldwell, 145 U. S. 368–A. & E. Enc. of Law, Vol. 12, pp. 540–542**). Where delay has worked a wrong to the adverse party, who has thereby been induced to do or abstain from doing something, he who has occasioned the wrong is denied the relief on the grounds that his delay, under such circumstances, is a bar for laches; but so long as the relative position of the parties remains the same, and the adverse party is not directly prejudiced by the lapse of time, delay is of no consequence to equity (**A. & E. Enc. of Law, Vol. 12, p. 544**).

The appellee's claim is barren of equities, and unless the appellant's delays operate, *per se*, as positive bars to this Court's jurisdiction over the case, the plea must be denied. Groeck's pre-emption was invalid from the beginning, because the land was not subject to pre-emption—and time cannot make it valid, nor affect it in any way; nor, in this case, do any aiding presumptions

flow from the patent issued in pursuance of that invalid entry. Presumably Groeck placed some improvement, not alleged to have any value, upon the land, and resided there from September 1885 to July 1886—just long enough to enable him to make the land-office proof essential to the accomplishment of his fraud; but beyond this he has not occupied the land, nor made expenditures for improvements. Besides, notice of such occupancy, or of the pre-emption entry, was not brought home to the appellant; but the entry was made before the appellant's rights had ripened into an actionable title—and, with notice, the appellant was not bound to act, because it was powerless to. The appellant accepted the grant, complied with the condition of the owner's offer by establishing its general route and filing a map thereof, and the law preserved the land from the effect of the invasion of trespassers, pending construction of the road, without further diligence of appellant. Groeck made his entry, and Merrill purchased, with full knowledge of the appellant's equities (Tr. pp. 14, 15); and being in the position of purchasers with knowledge of a prior equitable claim, they can not, in any event, be heard to assert laches for *delays of shorter time than the statutes of limitation* **(Conn. Gen. Life Ins. Co. v. Eldridge, 102 U. S. 545).**

An understanding of the significance of the appellant's granting Act, and the nature of the grant of indemnity lands made by it, will clearly show that while the delays complained of subjected the appellant to liability of forfeiture for breach of condition in time as

between the Government and it, they are matters of no concern to the appellees.

The nature of appellant's grant :

The grant is conferred by the words "That there be, and hereby is, granted"; words which have been uniformly construed to make an *immediate transfer* of the right and title intended to be granted, in lands to be thereafter identified. The lands to which the right and title is thus transferred *in proesenti*, are designated in the Act as odd sections to be found in defined limits on each side of the road when definitely located; but when identified, the right and title granted having been transferred *in proesenti*, the grant takes effect, by relation, as of the date of the Act—and cuts off all intermediate claims, not specifically excepted from the grant. In other words, the effect of identification is to write into the grant a particular description of the lands; and thereupon the grant is to be read as if it contained such particular description at the time of its passage. The rule laid down in **Van Wyck v. Knevals, 106 U. S. 360–370,** has been followed, uniformly since—wherein it was said, at page 365 :

"The grant is one *in proesenti* * * * *; that is, it imports the transfer, subject to the exceptions mentioned, of a *present interest in the lands* designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of indentification until the route is definitely fixed. When that route is thus established the grant takes effect upon the sections by relation as of the date of the Act of Congress. * * * * It cuts off all claims, other than those

mentioned, to any portion of the lands from the date of the Act, and passes the title as fully as though the sections had then been capable of indentification."

The appellant constructed its road during the year 1888, and the map showing the definite location thereof was filed and accepted on April 2nd 1889 (Tr. pp. 8, 9). Until the last mentioned date the lands granted remained unidentified; but from January 3rd 1867, when the map of general route was filed, the lands had remained withdrawn; continuously, by section 6 of the Act—and were no more liable to preemption before than after, nor after than before, definite location (**Buttz v. Nor. Pac. R. R. Co., 119 U. S. 71**). Which illustrates that the delay, if delay there was, in nowise injured the appellants, nor altered the status of their relations with either the land or the appellant. It is true the Government might have declared *forfeiture* for *breach of condition* in time of construction; but the government *accepted* the road as constructed, and *approved* the map of location when filed. Construction and definite location stand, therefore, as made within the time conditioned by the granting Act; and there having been no breach of condition there was no delay—and without delay there could not have been laches. From which it follows, that if the appellant has been guilly of laches, it must be for delays since April 2nd 1889, the date its map of definite location was filed and accepted; and it will be remembered that this suit was brought on February 12th 1892—within three years after the lands granted were identified by definite location, and within two years after (April 11th 1890) the date of Groeck's

patent. As before shown, the appellees having purchased with knowledge of the appellant's prior equity can, under no circumstances, plead the bar of laches for a delay shorter than the period prescribed by the statutes of limitation; and the period of our statute is four years (Sec. 343, C. C. P.). This suit was, therefore, brought in time had a right of action affording adequate relief accrued on April 2nd 1889, the first day the lands granted became capable of identification; but the wrong sought to be remedied was done on April 11th 1890, by the issue of the patent—and, as before said, this suit was brought within two years after that date.

Definite location of the road, on April 2nd 1889, identified the lands transferred by the *proesenti* grant made by the Act; so that, read on the day of definite location, the Act constituted a conveyance as of its date, of such right or title to the identified lands, as Congress intended to grant.

It is settled law that the Act under consideration granted a legal title to the odd sections within the primary limits of the road, which attached, upon definite location, as of the date of the Act (**U. S. v. S. P. R. R. Co., 146 U. S. 570—Deseret Salt Co. v. Tarpey, 142 U. S. 248**); but as to the lands within the *indemnity limits* it granted a preference right to select the identified lands. The grant to the Atlantic & Pacific Company as well as that to the appellant, was made by the same sections (3 and 6) of the Act under consideration; so that a construction of those sections for the Atlantic & Pacific grant is necessarily a construction of them for the

appellant's grant. Considering the nature of the right or title conferred by this Act at the date of definite location, and before selection, in the case of the **United States v. Colton Marble and Lime Co., 146 U. S.**, at pages 617 and 618, the opinion says:

"It might well be assumed that very likely the Atlantic & Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. The right of selection was a prospective right, and if it was to be fully exercised no adverse title could be created to any lands within the indemnity limits. * * * * In fact every withdrawal of lands from the aggregate of those from which selection could be made, would more or less impair the value of selection. * * * * That prospective right would be impaired by the transfer of the title of a single tract."

In the case of the **S. P. R. R. Co. vs. Wiggs, 14 Saw. 568,** construing the indemnity provisions of the Act now under consideration, Judge Sawyer said:

"In this case the *right to select* in the future, this land, in the part limited for that purpose, *vested*, should there turn out to be a deficiency, on filing the map of definite location, thereby fixing the limit of the district for selection, although no *title* to the land vested till selection. * * * * The right to select at once vests, though the title to specific lands does not till selection is made."

In the case of **Nor. Pac. R. R. Co. vs. Barnes, 51 N. W. Rep. 401,** construing a grant almost identical with the plaintiff's here, it was held:

"The *indemnity lands* are, therefore, *granted equally with the place lands* within the forty-mile limits, by this Act. They are of the 'amount of twenty sections per mile' granted, and the words 'there be, and hereby is, granted'

apply to them, and pass the title. The only distinction between the two classes of land is the method by which they are identified. Once identified, the company has the same title to the one as to the other. The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified."

Considering the same grant the Circuit Court of Appeals, in the case of the **Nor. Pac. R. R. Co. vs. Amacker, 1 C. C. A. 348–9,** held as follows:

"The land grant of the Northern Pacific Railroad Company, under the Act of July 2, 1864, was a grant of quantity to the extent of twenty alternate sections per mile on each side of the line of road through the territories of the United States, and ten alternate sections of land on each side of the road whenever it should pass through a State. * * * * The grant was, therefore, not only one of quantity, but it was also in the nature of a float, to be located within the limits of certain exterior boundaries containing such a number of odd numbered sections as would enable the company to obtain by selection within such exterior boundaries, the full quantity of land granted."

As said in the Barnes case (51 N. W. Rep. 401), "The indemnity provision does not make an additional grant, but simply points out the method by which lands already granted may be identified." The Act *transferred.* as of its date, a *present* or immediate interest in a specified quantity of land designated by general description, and upon the filing of the map of general route withdrew those lands from liability of disposal otherwise than to the appellant, pending particular identification of the lands. No selection of the lands in the primary limits being required, identification is completed by definite location alone; and so it is said

that the *title granted* and the *lands granted* are brought together by definite location. As it could not be known at the date of the grant whether all, or what portion, of the indemnity lands would be required to supply the deficiency of quantity because of prior disposition in the primary limits, the Act requires that the indemnity lands "be selected under the direction of the Secretary of the Interior;" and it is well settled by the decisions that until, after definite location, such selection is made, the right or title to any particular tract of indemnity land remains inchoate. The corresponding provision in some of the railroad land grants is that the indemnity lands be selected "subject to the approval of the Secretary of the Interior;" and in construing those grants it has been held that the grantee's title to a particular tract is not specific until, after definite location and selection, the selection is approved by the Secretary. In the case of **Chicago Ry. Co. vs. Sioux City Ry. Co., 3 McCrary's Reports at page 300,** it was held:

"The lands in place and the indemnity lands were granted by Congress for precisely the same purpose. The intention of the grantor with respect to them was exactly the same. The mode of making the title of the trustee specific was different, but when that title became certain in the trustee by the location of the definite line in one case, and by selection in the other, it was the duty of the trustee to apply the two kinds of land to precisely the same trust."

In **Wis. Cent. R. R. Co. v. Price Co., 133 U. S. 496,** it was held (syl.):

"5. The title conferred by the grant was imperfect until the land was indentified by the location of the road;

but when the route of the road was fixed, the sections granted became susceptible of identification, and the title attached to them and took effect as of the date of the grant, so as to cut off all intervening claims.

9. No title to the indemnity lands becomes vested in any company until the selections are made, and they have been approved of, as provided by the statute, by the Secretary of the Interior; until which time such indemnity lands are not subject to taxation."

The Wisconsin Central case was decided along the principle that lands became subject to taxation at that stage of title when the restrictions upon possession are removed; and it was held that the restrictions were removed at definite location as to the primary lands, but not until approved selection as to the indemnity lands. It follows, therefore, that the appellant had no action at law before selection—and until the patent issued to Groeck it had no actionable equitable right. Until the road was definitely located (April 2nd 1889) appellant was not entitled to select this land, because it was not identified; and it applied to select it on July 13th 1891. But had the selection been made on the earliest day permissible (April 2nd 1889) this suit, brought on February 12 1892, was in time; which, in connection with the fact that Groeck's entry upon which the patent depends was made before the appellant could have selected, demonstrates that it is of no consequence to the appellees' claim whether the selection was delayed or not.

The rejection of appellant's list immaterial:

On July 13th 1891 the appellant, acting "under the direction of the Secretary of the Interior," selected the

land in suit (Tr. p. 11); but the plea says that the selection was rejected by the local land-officers and the Commissioner. The bill and plea in this case and in the case of the **Southern Pac. R. R. Co. v. Smith,** are identical as to their allegations about the Company's right to select, its application to select, and the rejection thereof—except here the plea says the selection was rejected by the local land-officers and the Commissioner, and in the Smith case the corresponding allegation of the plea was that the Secretary of the Interior rejected the selection. The two cases were argued together, and decided on the same day. As to the effect of the application to select, and its rejection, it was held in the Smith case **(74 Fed. Rep., 591):**

"The plea further alleges that from March 3, 1871 to October 3, 1887 the complainant did not select, or apply to select, the lands involved in this suit, as indemnity lands, under the direction of the Secretary of the Interior, or otherwise; and the defendants deny that the Secretary of the Interior approved the complainant's application to select the lands in controversy, and allege that he rejected the same. * * * * The lands in controversy being within the indemnity limits of the complainant's grant, and being at the time of attempted selection vacant and unappropriated, to which the United States had full title, and not fully within any exception to the grant, and the complainant having done all in its power to select them by filing in the proper land office its claim to them in due form, accompanied by the affidavits and certificates required by law, and paying the proper fees, I think it clear that it is entitled to maintain the present bill."

Even in cases where, under the provisions of the granting Act, the Secretary's *approval* is required, he

can not act capriciously; and (in equity) the right to approval is equivalent to approval—for "equity looks on that as done which ought to have been done."

The following quotations are copied from the citation notes on page **641, Vol. 1, Am. & E. En. of Law,** under the title "**Approve**" etc.:

"Even if the phrase '*approved bill*' were introduced, I think it could only mean a bill to which no reasonable objection could be made, and which *ought to be approved.* (Hodgson vs. Davies, 2 Campbell 530)."

"So where one agrees to execute to another a note with 'good and approved freehold surety' the latter can not arbitrarily refuse the surety; it is sufficient if the surety be good freehold surety, *worthy of approval.* (Andis vs. Personett, 9 N. E. Rep. 101)"

"On a sale for 'approved' indorsed paper, the construction of the law is, paper which *ought to be approved.* (Guier & Diehl vs. Page, 4 S. & R. (Pa.), I)"

On such sale the burden of proof is thrown upon the vendee to show that it was such a note as the vendor *ought to* have received and approved. (Mills vs. Hunt, 20 Wend. (N. Y.) 431)"

In the **Wiggs case**, cited supra, the plaintiff's selection was presented after the Government patented the land to Wiggs, and the selection was rejected by the Register and Receiver when presented. The List was in the required form for such selections, and accompanied by the requisite fees. Speaking of this selection Judge Sawyer, at page 570 (**14 Saw.**), said that the Company had thus "selected the lands so far as it could make a selection without the concurrence of the department."

(a) *As to delay in definite location :*

The Government, the vendor under the contract, accepted and approved the road as constructed in time, and the map as filed in time—and, therefore, there was no delay ; but even had the road not been constructed at all, nor the map filed, it would be of no consequence to the appellees. **In Van Wyck v. Knevals, 106 U. S. 368-9,** where that portion of the road opposite the land in suit had not been constructed at all, it was said :

"If the whole of the road has not thus been completed, the forfeiture consequent thereon can be asserted only by the *grantor*, the United States through judicial proceedings, or through the action of Congress (Schulenberg v. Horriman, 21 Wall. 44). A *third party* can not take upon himself to enforce conditions attached to the grant, when the Government does not complain of their breach."

But, as before when shown, this land was *reserved from all liability to Groeck's claim*—and his relations and conditions were in nowise affected by the location, whenever made.

(b) *Was the selection in time?*

This land was reserved, and not subject to Groeck's preemption, even though *no selection* had been made. As said by Judge Sawyer, construing this grant in the case of the **Southern Pac. R. R. Co. v. Wiggs, 14 Saw. 574 :**

"It does not appear to me that this language is susceptible of more than one construction, and that is that no preemption right could be perfected or initiated in the face of that prohibition until *Congress sees fit to withdraw it,* while still in its power to do so, or till the whole claim of the company for deficiency is both ascertained and satisfied.

As Congress did not see fit to put *any limitation upon the time for selection*, neither the Secretary of the Interior nor the Courts are authorized to prescribe such limitation."

This is evidently the view of the United States Supreme Court—for it is remarked in **U. S. v. Colton M. & L. Co., 146 U. S. 618,** distinguishing between the nature of the grantee's rights to the primary and indemnity lands, that:

"It must be borne in mind that these lands were in the granted limits of the Southern Pacific, and that they were not lands in respect to which that company would have a right of selection, *and might defer the exercise of that right until such time as suited it.*"

(c) *This suit was brought in time:*

The appellees, having bought with knowledge of appellant's prior equity, can not complain (if at all) of any period shorter than that prescribed by the statutes of limitations—and the shortest statute applicable is four years. Until selection the appellant had no actionable right; nor could adequate relief be obtained until the patent issued to Groeck. The suit was brought in less than three years after definite location, in less than three years after the earliest date at which the land could have been selected, in less than two years after Groeck's patent issued, and in less than one year after selection.

Respectfully submitted,

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WM. SINGER, JR.,
Counsel for Appellant.

No. 398.

n the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,
Appellant,

VS.

OTTO GROECK AND C. S. MERRILL, JR.,
Appellees.

Brief of Appellees.

W. B. WALLACE,
Counsel for Appellees.

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No. 398.

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NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,
APPELLANT,
vs.
OTTO GROECK AND C. S. MERRILL, JR.,
APPELLEES.

Brief of Appellees.

The defense to this suit embodies two general propositions.

I.

THE LAND IN CONTROVERSY, AT THE DATE OF DEFENDANT GROECK'S ENTRY THEREON, WAS EQUALLY SUBJECT TO ENTY BY A SETTLER, OR SELECTION BY PLAINTIFF, UNDER THE DIRECTION OF THE SECRETARY OF THE INTERIOR, UNLESS RESERVED BY EXECUTIVE ORDER, AND THE ACTS OF THE LAND DEPARTMENT IN PERMITTING PLAINTIFF TO ENTER THE SAME AND IN ISSUING A PATENT TO HIM OPERATED AS A RE-

VOCATION IN PART OF ANY PRIOR ORDER OF WITHDRAWAL.

II.

THAT WHETHER THE FOREGOING PROPOSITION BE WELL FOUNDED OR NOT, PLAINTIFF IS IN THIS SUIT BARRED BY REASON OF ITS LACHES IT NOT EXERCISING DILIGENCE IN DEFINITELY LOCATING ITS ROAD, SELECTING THE LAND, AND COMMENCING THIS SUIT.

PROPOSITION I.

Under this head and included in this proposition, we contend:

1. That appellant's grant is not an absolute grant of quantity, the word "amount" in section three of the granting act in view of the indemnity and other provisions being used simply as a word of enumeration and having no greater force or effect than would the word "number," "extent," or "limit."

2. That the act under which appellant claims is a grant *in praesenti* of the specific alternate odd sections within twenty miles on each side of the road as definitely located *and of these only*, with the privilege of supplying losses occurring within the granted limits from the indemnity limits by selections under the directions of the Secretary of the Interior.

3. That the right to acquire indemnity lands is dependent upon the status of the land at the date of selection, and when patented to the company the title relates back only to the time of selection.

4. That the words "hereby granted" in section six of the aforesaid granting act refer only to the alternate odd sections within twenty miles of the line of road on each side, and said section six operates to withdraw only the lands within the primary limits.

5. That the withdrawal of the alternate odd sections within the indemnity limit of appellant's grant is dependent solely upon executive action; and that any executive withdrawal thereof could be revoked in part, or as a whole, at any time and said land restored to the public domain.

6. That the words "under the direction of the Secretary of the Interior," in section 3 of said act mean in accordance with the rules and regulations promulgated by the Secretary of the Interior and subject to his supervision and approval.

The uniform rulings of the land department for a great many years confirm these views.

There have been but three general classes of railroad land grants recognized by the land department.

1. A grant of quantity as the grant to the

Burlington and Missouri River Railroad (13 Statute, 350), which had no lateral limits and contained no indemnity provisions.

2. A grant of lands in place.

3. A grant of lands in place for a certain distance on each side of the line of the road with a provision for selecting other lands within restricted limits under certain regulations to supply losses in place, as the grants of 1856 and the grant under which appellant claims.

CONSTRUCTION OF THE LAND DEPARTMENT.

Pre-emption claims were allowed on indemnity grant lands by order of the General Land Office as early as 1858.

Lester's Land Laws and Regulations, 511.

By the method of procedure of the Interior Department provided for making indemnity selections under railroad grants and which were adopted January 24th, 1867, the selecting agent is required to state in an affidavit among other things, "That the said lands *are vacant unappropriated*, and are not interdicted or reserved lands."

Zabriskie's Land Laws of the U. S., p. 285.

Upon the filing of an indemnity selection if found correct, the register and receiver of the local land office are required to certify, among

other things, "nor is there any *homestead*, *pre-emption*, state or other valid *claim to any portion of said lands on file or of record in my office.*"

Id., 286.

On March 22d, 1867, the Commissioner of the General Land Office in a letter of instruction to the registers and receivers of the local land offices construed the grant to appellant under the said act of 1866 in these words: "The grant for this road is found in the 18th section of the above act. By that section this company is granted *every alternate or odd numbered section of public land for ten sections in width* on each side of the line of route, and indemnity for lands sold, reserved or otherwise appropriated within the grant, from the alternate odd sections of unappropriated land not more than ten miles *beyond the limits of the granted sections. The limits of the grant then are twenty miles on each side of the road*, and of the indemnity, thirty miles on each side."

Zabriskie's Land Laws of the U. S., 293.

In 1879 Secretary Schurz held that under a grant similar to appellant's the grant will not operate upon indemnity lands until the same have been selected in the manner provided by law.

Blodgett vs. Cal. and Or. R. R. Co. Copp's Public Land Laws, 814.

The whole subject of selecting indemnity

lands for appellant is placed, "Under the direction of the Secretary of the Interior." The power to direct a proceeding implies not merely oversight in minor details, but control, supervision, *discretion*, and power to adjudge when, in what manner, to what extent, the statute requires the exercise of such control and *discretion* as to give the public as well as the grantee all the rights and privileges granted by law.

N. P. R. R. Co., 11 Dec. Dept. Int., 511.
Knight vs. United Land Ass'n, 142 U. S., 161.
Elling vs. Thexton, 16 Pac. Rep., 93.

In Brady vs. S. P. R. R. Co. it appears that Brady entered upon the land there in contest prior to the revocation of the order of withdrawal and was permitted to make a homestead entry thereon, and upon an appeal from the decision awarding him the land the acting Secretary of the Interior says: "If it is within the power of the department to revoke the withdrawal as to all the lands, it surely has the power to revoke the withdrawal of part of said land, and *the decisions of the department that have crystalized into a general rule may become as effective for that purpose as the order of the Secretary directly withdrawing all the lands.* All questions as to the preference rights of settlers to the public lands must be raised and decided in the local

office, and a failure so to assert their rights and to bring the same before the general land office by appeal will estop them from asserting their rights."

Brady vs. S. P. R. R. Co., V Dec. Dept. Int., 658.

On May 20th, 1887, Secretary Lamar in a letter to the President, set forth a list of a vast number of withdrawals of railroad indemnity lands, of which he says: "These withdrawals, as shown by this table, have been running and continued in operation for more than two years in the case of the Ainsworth and Swank Creek Railroad to nearly thirty-seven years in that of the Mobile and Ohio.

"Under the rulings of this department, no settler can acquire any right under any of the general land laws to any part of the public domain, so long as the same remains withdrawn by order of the President or by his authority.

"There seems to be no valid reason why these orders of withdrawal should not be revoked. *Obstructions in the way of bona fide settlement of the public domain should be removed as speedily as possible after the reasons which created them have ceased to exist.*" The Secretary then suggested that notice be given to the managers of said Railroads to show cause why the withdrawal of indemnity lands for their benefit should

not be revoked. This action was approved by the President, an order to show cause made by the Secretary, and after answer made to said order by the appellant here and many other Railroad Companies the Secretary filed an elaborate decision in the matter of the Atlantic and Pacific Railroad Company, the terms of the grant to which are identical with those of the grant to appellant and are contained in the same act. 14 Stat. 292.

The Secretary says: "*Now here was a grant to the free alternate odd numbered sections to be found within twenty miles on each side of the road in the States* and within forty miles in the Territories with the right to take the free odd numbered sections found within a further limit of ten miles, as indemnity for lands lost in the granted limit; the order was for the survey of the land 'for forty miles in width' *or only to the extent of the granted limit in the Territories, and ten miles beyond the granted and indemnity limit in the States.* While surveys were to be made to this extent the withdrawal of lands after the general route shall be fixed from sale or entry or pre-emption before or after survey only related to '*the odd sections hereby granted*' this plain statement shows the *contract of the Government was to give the stated quantity of land if it could be found free within the granted limit.* As to the indemnity land the Secretary says: "Here

the interest of the Company was so remote and contingent being a mere potentiality and *not a grant*, that congress declined to order a withdrawal for the benefit of the same, or even a survey within the territories.

"*It is appa ent from the granting clause of said act that the grant was not one of quantity, but for a certain number of sections in place;* and if not there then it gave the privilege of looking for the deficiency in restricted limits. Had congress intended the company should absolutely have the full quantity of land designated it would not have restricted the right to select the odd sections within ten miles, but would have placed no limit upon the right of selection, as in this case of the Burlington and Missouri River Railroad. (98 U. S. 334.)

"On a full consideration of the whole subject I conclude that the withdrawal for indemnity purposes if permissible under the law was solely by executive authority and may be revoked by the same authority; *that such revocation would not be a violation of either law or equity and that said lands have been so long withheld for the benefit of the Company, the time has arrived when public policy and justice demand the withdrawal to be revoked and some regard had for the rights of those seeking and needing homes on the public domain.*

"If I had any doubt I should be confirmed in this course by what may be regarded as a distinct recognition by congress of the correctness of its policy to be found in section 3 of the act of April 21st, 1876 (19 Stats., 35), where it is said:

" 'That all such pre-emption and homestead entries, which may have been made by the permission of the land department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to the expiration of such grants shall be deemed valid; and a compliance with the laws and the making of the proof required shall entitle the holder of such claims to a patent.' "

6 Dec. Dept. Int., 77, 79, 84-93.

The Secretary thereupon made an order revoking the withdrawal of indemnity lands upon the lines of a great number of railroads including plaintiff's.

Id., 84-93.

Indemnity cannot be allowed for losses sustained through the erroneous certification of lands in place to another company, or for lands sold by the government after definite location of of the road. The remedy in such cases must be sought in Court.

Secretary Lamar, 6 Dec. Dept. Int., 196.

In a leading case cited by Secretary Vilas involving the construction of an act granting lands to the Northern Pacific Company, the granting and withdrawal clauses of which are in the exact language of those under which the appellant claims, the Secretary says in a very lengthy decision: "In my opinion, and it is with great deference that I present it, the granting act did not only not authorize a withdrawal of lands within the indemnity limit, but forbade it. The difference between lands in the granted limit and lands in the indemnity limit, and between the time and manner in which the title of the United States changes to and vests in the grantee accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well settled rules upon this subject."

As to lands in the primary or granted limits:

"The title to the alternate sections to be taken within the limit when all the odd sections are granted, becomes fixed, ascertained and perfected by this location of the line of road, and in case of each road the title dates back to the act of Congress."

St. Paul R. R. Co. vs. Winona R. R. Co., 112 U. S., 726.

Mo. Kas. & Tex. R. R. Co. vs. Kas. Pac. R. R. Co., 97 U. S., 491-501.

Van Wyck vs. Knevals, 106 U. S., 360.

Cedar Rapids Co. vs. Herring, 110 U. S., 27.

Grinnell vs. R. R. Co., 103 U. S., 739.

As to indemnity limits:

"The time when the rights to lands become vested which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant, or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limi of the location of the line of the road. In Ryan vs. R. R. Co., 99 U. S., 382, the Court speaking of a contest of lands of this class, said: 'It is within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specifically selected as it was for that purpose. * * * with respect to the lieu lands as they are called the right was only a float, and attached to no specific tracts, until the selection was actually made in the manner described.'" Continuing, the Secretary says: "It was a vast grant, and even as so limited a threatening shadow to fall on the settling of the Northwest. Well might Congress say, 'the lands granted you shall have, but you shall tie up no

more from the actual settler to the prevention of development.' "

In speaking of the rule of the land department requiring a specification of losses in making selections the Secretary further says: "It was in obedience to the last clause that this company filed on the 25th of October, 1887, the list of particular deficiencies upon which the claim of selections in list No. 2 before mentioned was based. That list excellently illustrates the necessity for the rule mentioned. Since 1883 the claim of this company to take the 58,000 acres in list No. 2 has remained a cloud upon all the lands embraced within it. Yet when called upon to specify particular lands lost from the granted limits for which such a right of selection can vest, only 4011 acres are shown, except by claiming indemnity for about 55,000 acres of land for the most part not particularly defined, lying within the Yakima Indian Reservation * * * The tracts listed as lost to the grant because lying within the Yakima Indian Reservation in fact passed to the company by the grant, and afford no basis to select others in lieu thereof."

The facts recited in this decision show the imperative necessity of having all lieu land selections subject to the final examination and approval of the Secretary of the Interior.

Northern Pacific R. R. vs. Miller, VII, Dec. Dept. Int., 100.

A homestead entry allowed for lands embraced within an indemnity withdrawal is not illegal, and on the revocation of the withdrawal is relieved from conflict with the railroad grant, if no selection of the land has been made thereunder.

Mudgett vs Dubuque and Sioux City R. R. Co., VII Dec. Dept. Int., 242.

Secretary Noble held in S. P. R. R. Co. vs. Barry that "a settlement acquired and maintained in good faith after the revocation of an indemnity withdrawal is entitled to priority as against a subsequent selection by the company."

S. P, R. R. vs. Barry, XI Dec. Dept. Int., 494.

In N. P. R. R. Co. vs. Walters, referring to the decision in the Price County case, 113 U. S., 496, and the cases there cited, the Secretary says: "I do not think it was intended to overthrow this long line of decisions and to lay down a different rule in the case of St. Paul and Pac. R. R. Co. vs. N. P. R. R. Co., 139 U. S., 1. In that case it was held that there not being a sufficient quantity of lands in Minnesota to meet the requirements of the N. P. R. R. Co., the lands there in question (being those which were in the granted limits as shown by the map of general route and withdrawal thereunder, and within the indemnity limits on definite location) were so appropriated as to come within the terms of exceptions in the

subsequent grant and that as to those lands no selection was necessary to preserve said company's right against the subsequent grantee." The grant to the "subsequent grantee" there excepted all lands *reserved by any competent authority.*

N. P. R. R. Co. vs. Walters, XIII Dec. Dept. Int., 145.

In the S. P. R. R. Co. vs. McWharter it was urged under the authority of the decision in 139 U. S., 1, that the act making the grant withdrew the land "in the forty mile limit" and that no selection was required to save the company's right of selection, it being shown that there was a deficiency in the grant. Secretary Noble says in his decision in this case: "I deem it unnecessary to refer to the decision (139 U. S., 1), further than to say it has no application to the facts in this case.

"I might remark in passing that if the construction insisted upon by counsel be correct then a reservation exists ten miles beyond the indemnity limit of this grant in this State, as it is limited to thirty miles on each side of the road in the selection of its indemnity.

"*The withdrawal contemplated by the sixth section of this act has been uniformly construed to relate only to the primary or granted lands*, and the validity of any further withdrawal upon the

filing of said map rests entirely upon executive action."

S. P. R. R. Co. vs. McWharter, XIV Dec, Dept. Int., 610.

Secretary Smith in a similar case to the above considered the decision in 139 U. S., 1, and held that *the fact that a deficit exists in the grant does not relieve the company from the necessity of selection to acquire title to indemnity lands.*

N. P. R. R. Co. vs. Davidson, XVI Dec. Dept. Int., 457.

A homestead entry of land included within an indemnity withdrawal but for which the right of selection had not been asserted at the date of final proof, and prior to the revocation of the withdrawal, is not defeated by *a mere protest of the company against the final proof filed while the withdrawal is in force.*

S. P. R. R. Co. vs. Waters, XVII Dec. Dept. Int., 270.

In a recent case decided by Secretary Smith, March, 1894, it was again insisted by the company that there was a statutory withdrawal of the odd sections within its indemnity limit. The Secretary in his decision says: "*It has been the uniform construction of this department that the requirement to withdraw land on account* of the Pacific railroad grants upon the location of the

roads *extended only to the granted limits;* that all withdrawals of indemnity lands on account of these grants rests on executive action alone, and consequently that such indemnity withdrawals might be revoked whenever in the judgment of the Secretary of the Interior the necessities of the case required it. * * * The decision of the Supreme Court in the case of the St. Paul and Pac. R. R. vs. N. P. R. R. Co. (139 U. S., 1) *is not authority for holding that any rights attached within the indemnity limits prior to selection, sufficient to amount to an appropriation of the land as against the United States and bar other disposition of the same*, for if it is then the orders of August 15th, 1887, were ineffective, as restoration could not be made of lands already appropriated. * * * As between the two grant claimants it may however be admitted that all the lands within the indemnity limits will but partly satisfy the indemnity grant, and as against such subsequent grant the Court holds that nothing can be taken within such indemnity limit, as by its own admission they became appropriated upon the definite location of the line of road on account of which the prior grant was made. That this was as far as the Court meant to go in that case clearly appears by its decision in the case of the U. S. vs. Colton Marble and Lime Co. (146 U. S. 615). In that case the Court says:

" 'The ordinary rule with respect to land within indemnity limits is that no title passes until selection. Where as here the deficiency in the granted limit is so great that all the indemnity lands will not make good the loss, it has been held in a contest between two railroad companies, that no formal action was necessary to give them to the one having the older grant as against the other company.'

"I see nothing in the argument of counsel to warrant a charge in the uniform construction of these grants."

Southern Pacific R. R. Co. 18 Dec. Dept. Int., 314.

In N. P. R. R. Co. vs. Lillethum, 21 Dec. Dept. Int. 487, it was s renuously urged that indemnity land is land "Hereby granted" and was withdrawn from sale by the granting act, and Beach vs. Wood was cited as authority for this position. Secretary Smith, in ruling against the company, says: "It is not necessary to make further citations as to a construction so well settled and which may be said emphatically to be uniform."

The right of the S. P. R. R. Company to select indemnity land is dependent on the status of the land at date of selection.

S. P. R. R. Co. vs. McKinley, 22 Dec. Dept. Int., 496.

Secretary Francis held that land within the indemnity limits of the N. P. R. R. Co. is open to settlement and entry

N. P. R. R. Co. vs. Ayers, 24 Dec. Dept. Int., 40.

So held Secretary Bliss, the present Secretary.

Muller vs. N. P. R. R. Co. 24 Dec. Dept. Int., 436.

If a different construction is placed by this Court upon the grant in question then the whole system adopted by the Land Department of the United States for the administration of appellants and all similar indemnity land grants and so long followed by that department has been erroneous, and will be overthrown.

As additional instances:

1. It is held that odd sections within the primary limit which where not free at the time of filing the map of definite location could not pass to the company but that odd sections within the indemnity limit which though not free at the date of definite location became free afterwards could be selected as lieu lands.

Ryan vs. C. P. R. R. Co. 99. U. S. 282.

2. The Statute (10 Statute 244 and Sec. 2357 Rev. St.) provides that the price to be paid for alternate reserved sections along the line of a railroad *within the limit granted* shall be $2.50

per acre and this Statute has been restricted to lands within the *primary limit* of the grant.

Zabrieskie, 293.

3. The Act of June 22, 1874 (18 St. 194), provides that in the adjustment of all railroad land grants if any of the lands granted be found in the possession of an actual settler, whose entry or filing has been allowed at the time at which, by the decision of the land office, the right of said road was declared to have attached, the grantee upon relinquishment might select an equal quantity of other lands in lieu thereof from any of the public lands not mineral within the limits of its grant.

But it is held that lands within the indemnity limit of the grant do not afford a basis for relinquishment and selection under this act.

St. Paul and Sioux City R. R. Co 10 Dec. Dept. Int., 50.

U. S. vs. St. Paul and Sioux City R. R. Co., 10 Dec. Dept. Int., 509.

Instruction to Registers and Receivers 11 Dec. Dept. Int., 434.

The above authorities contain a history of the uniform construction of plaintiff's grant and other similar grants by the officers of the land department for a long period of years. These officers in the expressive language of the Supreme

Court "are usually able men and masters of the subject."

If there were any ambiguity or doubt then such a practice begun so early and continued so long would be in the highest degree persuasive if not absolutely controlling in its effect.

U. S. vs. Graham, 110 U. 219.
U. S. vs. Philbrick, 120 U. S. 59.
Hasting D. R. R. Co. vs. Whitney, 132 U. S. 161.
Noble vs. Union River Logging Co., 147 U. S. 965.

In U. S. vs. Burlington & Missouri River R. R. Co., Supra, this Court said: "This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It can not at this day be called in question."

THE WITHDRAWAL CLAUSE FURTHER CONSIDERED.

Many of the acts passed by Congress in 1856, granting lands in aid of railroads, including those to Iowa, Wisconsin and Minnesota, contained withdrawal clauses similar to that in plaintiff's grant. They provided that the lands "hereby granted for and on account of said roads shall be exclusively applied in the construction

of that road for and on account of which said lands are hereby granted." Such provisions formed part of the acts construed in the Herring case, 110 U. S., 27; the Barney case, 117 U. S., 228; the Price County case, 133 U. S., 496; and in U. S. vs. The Mo. K. T. R. R. Co., 141 U. S., 358. These are as strong expressions as are found in plaintiff's grant, and it has never been held that they constituted legislative withdrawals of indemnity lands even after definite location of the line of road.

Many decisions have been rendered by the Circuit Courts in reference to lands within the primary limits of the grant to the Northern Pacific Company and situated in Territories; none of which declare that the act creating the grant withdrew the land from market beyond the primary limit. Nearly all of them quote the Butz case as authority for the doctrine that within the Territories the land is withdrawn for forty miles on each side of the road. By these decisions the expressions "*limits of the grant*," "*within its grant*," "*lands hereby granted*," are restricted to lands in the primary limits.

Denny vs. Dobson, 32 Fed., 899.

N. P. R. R. Co. vs. Cannon, 46 Fed. Rep., 224.

N. P. R. R. Co. vs. Amacker, 46 Fed., 223.

N. P. R. R. Co. vs. Cannon et al., 46 Fed., 237.

N. P. R. R. Co. vs. Sanders, 47 Fed., 239.

U. S. vs. Ordway, 30 Fed., 30.

On the principle that the expression of one thing is the exclusion of another, is it not the effect of all these decisions to declare that lands within the indemnity limits of the Northern Pacific Railroad grant are not withdrawn from market by the granting act?

In Denny vs. Dobson, the Court said: "There does not appear to be any serious question as to the lateral extent of the grant. The act of Congress makes that depend upon the location of the road, whether in a Territory or in a State. If in the former, the grant has twice the extent that it has when located in the latter."

All the decisions of the U. S. Supreme Court holding plaintiff's and other similar grants to be *in presenti* limit the expression to lands within the primary limits.

In a very recent decision, the U. S. Supreme Court, in construing the grant to the N. P. R. R. Co., said: "Neither is it intended to question the rule that the title to indemnity lands *dates from selection and not from grant.*

N. P. R. R. Co. vs. Musser-Sauntry Land Log. and Mfg. Co., 18 Sup. Ct. Rep., 205.

If then title to indemnity lands does not when selected relate back to the date of the grant, they are not within the terms "lands hereby granted," which necessarily refer to a present grant. Congress in this case granted certain specific lands and a mere privilege to the company to select if it chose other lands to supply deficiencies.

We are not without legislative construction as to the extent of the withdrawal contemplated as is disclosed by the grant to the Texas Pacific R. R. Co.

The lines of every one of three great roads having land grants in almost the same language lay through two States and from two to four Territories—The Northern Pacific, the Atlantic Pacific, and the Texas Pacific. The granting acts of the two former in general terms granted "every alternate section designated by odd numbers to the amount of twenty alternative sections through the Territories, and ten alternative sections through the States, and created a legislative withdrawal of "the lands hereby granted."

For nearly a thousand miles the line of the Texas Pacific road lay through the State of Texas, in which State the government owned no land, and for that reason it became necessary to omit that State from the terms of both the granting and withdrawal clauses. The latter authorizes the Secretary of the Interior, upon filing the

map of general route to "cause the lands within forty miles on each side of said designated route within the territories and twenty miles within the State of California to be withdrawn from pre-emption, etc., but provides that the homestead and pre-emption laws are extended to all other lands in the United States along the line of said road when surveyed, 'except those hereby granted to said company.'" This grant was made March 3d, 1871.

16 U. S. Stat. at Large, 573.

The proviso is the same in all three grants and lands within the indemnity limits are certainly "on the line of said road."

In the Wiggs case, plaintiff's map of 1867 was treated by plaintiff and found by the Court to be a map of definite location; it was also alleged in that case that all the lands in the indemnity limits of plaintiff's grant would only in part supply the deficiencies in the granted limits. The construction placed upon the granting act by the land department does not appear to have been considered, nor does it appear from the decision that the Court was apprised of the fact that the executive order of withdrawal had been revoked. The question of laches was not considered; the complaint alleges that the selection list was rejected *for the sole reason that said land was patented by Walter Wiggs.* There

too it appears that the complainant contested Wiggs's right to preempt the land through all the various departments of the land office to final decision by the Secretary.

In this case, in the Wiggs case, and in the Araiza case the cases of Buttz vs. N. P. R. R. Co., and Denny vs. Dobson appear to have been construed by the learned Judges who decided the three former as announcing the doctrine that on filing the map of general route by the grantee, the law withdrew from other disposition the land within forty miles of the line of road through states, as well as territories, while as already shown they appear to have held the contrary as to the line through states, by limiting the withdrawal to the lines of the granted limits in the Territories.

Plaintiff's allegation here as to its map of designated route is so worded that it is difficult to determine whether it is to be considered a map of general route or of definite location. Certainly plaintiff cannot claim that it is a map of definite location for the purpose of fixing the time when its grant takes effect as to lands in the primary limits and not one of definite location, for the purpose of determining the time when its right to select indemnity land first arose.

What Justice Brewer said regarding a legislative withdrawal in Wood vs. Beach was un-

necessary to the decision of that case, as the land there involved had been withdrawn by the land department and Wood was a mere trespasser whose claims were not recognized by that department. Had that eminent jurist the the present case before him, he would probably say what Justice Field stated in Barden vs. N. P. R. R. Co., "It is more important that the Court should be right upon later and more elaborate consideration than consistent with previous declarations."

CONSTRUCTION OF THE RIGHT OF SELECTION UNDER THE SCHOOL LAND GRANT.

The grants to States of the 16th and 36th sections and the 500,000 acre grant for the maintenance of public schools come nearer being *grants of quantity* than plaintiff's grant, and yet it has been uniformly held that the right of the State to select lieu lands for deficiencies in these grants must be made upon lands upon which there is no subsisting valid claim by pre-emption or otherwise, *at the time of selection;* that the statute gives the State no indefeasible right to select any particular tract of land.

Shepley vs. Cowan, 91 U. S., 330.
McCreary vs. Hiskell, 119 U. S., 327.
Terry vs. Megerle, 24 Cal., 623.

THE SECRETARY ACTS JUDICIALLY IN EXAMINING AND PASSING UPON INDEMNITY SELECTIONS, AND HIS APPROVAL IS NECESSARY.

U. S. vs. C. P. R. R. Co., 26 Fed R., 439.
Wisconsin Cent. R. R. Co. vs. Price County, 133 U. S., 496.
Elling vs. Thexton, 16 Pac., 931.
Resser vs. Carney, 54 N. W. R., 89.
Grandin vs. LaBar, 59 N. W., 241.

The last three cases concerned indemnity lands claimed by the N. P. R. R. Co., and the last one in emphatic terms repudiates the decision of the same Court in N. P. R. R. Co. vs. Barnes relied on by plaintiff.

The Secretary of the Interior, in passing upon lieu land selections and in adjusting plaintiff's grant is certainly charged with the duty of determining. 1. Whether it has not exhausted its claims to indemnity lands, 2. Whether a proper basis has been assigned, 3. Whether the basis assigned has been lost to plaintiff by its laches, by mistake of the Land Department, by reason of its falling within the granted or indemnity limits of some other road having a prior grant, 4. Whether at the time of selection it has not already been selected by the State as lieu school land, 5. Whether or not it has been granted to the State as swamp land or is mineral land, or was *sub judice* at the time the company

offered to select it. In determining these facts, the Secretary exercises judicial functions. If plaintiff's contention be correct, then the determination of all these questions is a matter for the plaintiff and when its list of selections is filed, the facts stated in the application to select must be considered by the Land Department of the Government as conclusively proven. It is not stated in this case why the offered selection was rejected nor does the action of the local land officers appear to have been brought to the attention of the Commissioner or Secretary, for the consideration of either of these officers.

In the Wiggs case, it was shown that the offer to select in that case was rejected for the "Sole reason that the land had been patented to Walter Wiggs."

The Rules of Statutory Construction sustain our position as to the first proposition.

We have the uniform construction by the officers of the Land Department for a long period, the legislative construction of Congress as shown in the Texas Pacific grant, and the decisions of the Supreme Courts of Montana, Minnesota and North Dakota; also the decisions of the U. S. Supreme Court construing other grants in aid of railroads. Certainly, if without these the Court were inclined to hold against us, their existence

at least show that the granting act is couched in ambiguous terms.

If the terms of a grant admit of different meanings, one of extension, and one of limitation, they must be accepted in a sense favorable to the grantor.

Dubuque, etc. vs. Litchfield, 23 Howard, 66.
Bardon, vs N. P. R. R. Co. 154 U. S. 288.

To determine the construction of an act, all parts of the act and all acts *in pari materia* and the entire system of laws on the subject must be taken and considered together.

1 Bac. Abr. (Statutes) 1. 3.
U. S. vs. Freeman, 3 How., 556.
Carter vs. Ryan, 93 U. S. 78.

PROPOSITION II.

PLAINTIFF IS BARRED BY ITS OWN LACHES.

In R. R. Co. vs. Herring, 110 U. S. 27, the Court said at pages 41 and 42:

"If he plaintiff has been injured, it is by its own laches. It there is no land to satisfy its demand, it is because it has delayed over three years to file its map to establish the line of its road, and for years after to make selections. It is unreasonable to say that during all that time these valuable lands were to be kept out of the

market when the country was rapidly filling up with an agricultural population, settling and making valuable farms on them."

This case is directly in point, for as to one tract of land involved it was entered by the settler after the map of *definite location* of the road was filed, and as we have shown, the grant involved contained words excluding the lands "hereby granted" from other disposition.

In Galliher vs. Cadwell, 145 U. S. 368, the Court said:

"The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact, no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper forum; that by reason of his delay the adverse party had good reason to believe that the alleged rights are worthless, or have been abandoned; and that because of the change in condition or relations during this period of delay, it would be an injustice to the latter to permit him to now assert them."

See also Curtner, vs. U. S. 149 U. S. 662.

The Government, through its Interior Depart-

ment, was warranted in assuming that plaintiff's scheme to build a through line of railroad along or near its line of general route had been abandoned as it undoubtedly has, for it has never been completed, and from Alcade to Tres Pinos its grant has been declared forfeited.

There are peculiar circumstances connected with this case which afford the strongest grounds for invoking and applying the doctrine of laches. If the map filed by plaintiff in 1857 was a map of general route, it neglected for more than twenty years to fix its line of definite location; if that map was one of definite location, it neglected for as many years to apply to select this land; it waited more than six years after defendant acquired an adverse interest in the land before bringing this suit and more than four years after the Secretary of the Interior had revoked its order of withdrawal. Because thousands of settlers were occupying and receiving patents for these indemnity lands, it was the duty of plaintiff, if it intended to continue the assertion of a claim to them, to procure a judicial interpretation of its grant from that tribunal to which alone the Land Department yields its construction. It did not do so. It took measures to prevent that Court from considering those provisions of the grant it claims under here.

On June 23rd, 1890, Judge Sawyer rendered

his decision in the Wiggs case. It was appealed to the Supreme Court, and on June 3rd., 1895, it was docketed and dismissed by the appellee.

15 Sup. Ct. R. 1044.

In the spring of 1890, the Circuit Judge of the Southern District of California rendered decisions in three cases, including that of the S. P. R. R. Co. vs. Tilley, (41 Fed. R. 729) on the same character of claims to indemnity lands it presents here. These decisions were adverse to plaintiff. It appealed, but five years later appellant not appearing these appeals were docketed and dismissed by the appellee.

16 Sup. Ct. R. 1206.

On November 20th., 1890, the same Court decided two similar cases S. P. R. R. Co. vs. McCutchen and S. P. R. R. Co. vs. Graham, against the plaintiff. Plaintiff appealed and in March 1895, when the cases were called for hearing, the company rather than submit the points so long decided against it by the Land Department to the Supreme Court of the United States, procured on its own motion the dismissal of these cases, notwithstanding the fact that these indemnity lands were being continuously patented to settlers.

15 Sup. Ct. R. 1042.

Defendant necessarily has been injured by this delay. He has been without the use of the money he paid for this land which, though not a large amount, is to the ordinary settler of great value. He has been injured to the extent of whatever improvements he has placed upon the land to the value of the time and expense incurred in occupying, cultivating, and improving it.

Plaintiff's complaint is barren of equity.

In conclusion, it may not be improper to say that if plaintiff's claim be sustained, the titles to thousands of homes established within the indemnity limits of a number of land grants will be destroyed, as settlers have been invited to occupy and found homes on these lands, from August, 1887 to the present day, by that department of the Government especially charged with the disposal of public lands.

We respectfully submit that the judgment of the Circuit Court should be affirmed.

W. B. WALLACE,
Counsel for Appellees.

No. 398.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

SOUTHERN PACIFIC RAILROAD CO.,
Appellant,

VS.

OTTO GROECK AND C. S. MERRILL, JR.,
Appellees.

Appellant's Reply Brief.

WM. SINGER, JR.,
Of Counsel for Appellant.

Filed February ..... *1898.*

..... *Clerk.*

H. S. CROCKER COMPANY, PRINTERS, S. F.

No. 398.

United States Circuit Court of Appeals,

NINTH CIRCUIT.

OUTHERN PACIFIC RAILROAD CO.,
Appellant,

vs.

TTO GROECK AND C. S. MERRILL, JR.,
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Appellant's Reply Brief.

PLAY UPON THE WORD "GRANTED."

Section 6 of the appellant's granting Act provides at the "land *hereby granted* shall not be liable to sale entry or pre-emption"; and the appellees contend that e word "*granted*", as there used, means the primary nds only.

This play upon the word "*granted*" originated, I lieve, in a letter addressed by Mr. President Cleveland Guilford Miller, construing the same section in

Northern Pacific's Act (13 St. 365); which letter received very general publication during the year 1886, and accomplished the order of August 15th 1887 set up in the pleadings here—which was a general order restoring the indemnity lands of all railroad grants, not theretofore selected or restored because of the final adjustment of the grant, or satisfaction of the quantity granted.

I have filed with the clerk of this court a copy (the only copy I have) of an official report made by Commissioner Stockslager on March 8th 1888, entitled "Statement showing land grants made by Congress to aid in the construction of railroads" etc.; which contains a tabular statement of each land grant made by Congress to aid in railroad building, the date and extent of withdrawals and restorations of lands therefor, and much other interesting information. This "Statement" shows that, with the single exception of the Texas Pacific grant (foot of page 20), the *indemnity lands were withdrawn whereever the primary lands were;* and that prior to the orders of restoration made in August 1887, the indemnity lands were not restored except for satisfaction of the quantity granted, forfeiture of the grant, and the like. This "Statement" is referred to for the purpose of showing the uniform construction of the withdrawal requirements of these Acts, prior to the orders of August 1887.

While the provision under consideration here is that the "land hereby granted shall not be liable" to preemption, section 12 of the Texas Pacific Act (16 St. 573) provides that the primary limits only be with-

drawn; and it has been suggested by counsel for the appellees that this may be taken as the expression of congressional desire that indemnity lands be not withdrawn for any grant. Our answer to this suggestion is that the Act makes two independent land grants, each to a different beneficiary—one to the Texas Pacific to construct a road from Yuma west to San Diego, the other to another company to aid in building a road from Yuma northwest to Mojave; the only difference between the two grants, in terms and conditions, being in *respect of the withdrawal provisions.* After setting forth the terms and conditions of the Texas Pacific grant, including withdrawal of the primary lands only, section 23 makes the other land grant according to the *terms and conditions of this Act at bar* (July 27th 1866)—instead of, as is usually done where two separate grants are made by the same Act, making the two grants upon the *same* terms and conditions; which, at least, seems to indicate a *congressional distinction* between the withdrawal provisions of section 6 in the appellant's Act, and the restricted withdrawal expressed for the Texas Pacific's grant.

In his decision of the **Chicago, St. Paul, etc., case, IX L. D. 467-469,** rendered on October 7th 1889, Secretary Noble in construing the meaning of the phrases "*land hereby granted*", "embraced in the *grant of lands*", and like phrases, as used in the congressional Acts granting railroad lands, made the following interesting review:

"In the Kansas Pacific case (112 U. S. 421) it is said that by the indemnity clause '*a right to select*' was given,

and in the Cedar Rapids case (110 U. S. 39) it is said that this *right* accrues as against the United States when the map of the entire line is filed. Now, then, on June 9, 1865, when the map was filed, we have the company entitled to its place lands and the '*right*' to select lieu lands as against the United States, fixed and vested, and if the land officers had made withdrawal as Congress says they ought to have done, also with the '*right*' to select *as against all subsequent settlers.* This, then, was the grant conferred by Congress, and of which it intended the company should have the benefit—ten sections of land per mile on each side of the road, to be obtained either within the primary or secondary limits; but ten sections the company was to have. On this plain statement it ought to be clear that the *right* both to place and lieu lands was conferred by the grant, and therefore, necessarily, they were in the language of the Act of 1873 'embraced in the grant of lands' made to aid in the construction of this road."

Secretary Noble's views are confirmed in the case of the **United States v. Colton Marble and Lime Co., 146 U. S. 617-618,** wherein, construing the indemnity grant at bar, it was said:

"It might well be assumed that very likely the Atlantic & Pacific Company would be called upon to select from the indemnity lands a portion sufficient to make good the deficiency in the granted limits. The *right of selection* was a prospective right, and if it was to be fully exercised no adverse title could be created to any lands within the *indemnity limits.* * * * * That prospective right would be impaired by the transfer of the title of a single tract."

So in the **Barnes Case** (51 N. W. Rep. 401) it was said:

"The *indemnity* provision does not make an additional grant, but simply points out the method by which lands *already granted* may be identified."

And in **Chicago Co. v. Sioux City Co., 3 McC. 300,** it was said:

"The lands in place and the *indemnity* lands were *granted* by Congress for precisely the same purpose. The intention of the grantor with respect to them was *exactly the same.* The mode of making the title of the trustee specific was different" etc.

This doctrine does not conflict with the rule in the Tax cases that the grantee has no *taxable interest* in the indemnity lands until selection made and approved; nor does this doctrine conflict with the rule in actions in ejectment or suits to quiet title, that such actions or suits cannot be maintained for indemnity lands *until after selection* made and approved.

Secretary Noble, continuing with his opinion **(IX L. D. 468–469)** said:

"But it is urged that by the use of the expression '*grant of lands*', Congress really meant granted lands, or lands within the primary limits of the grant. I can not concur in this view. The history of the legislation of Congress will doubtless show many instances wherein *indemnity*, and lands other than place lands, are referred to as *granted* lands. One or two instances suggest themselves to me, and may be briefly referred to. By the 9th section of Texas Pacific (16 St. 576), it is provided that if, in the too near approach to the Mexican border, the number of sections to which the Company is entitled can not be selected on the line of the road, then a like quantity of lands may be selected elsewhere; 'Provided that no public lands are *hereby granted* within the State of California further than twenty miles on each side of said road, except to make up deficiencies as aforesaid.' Here *indemnity lands* to be selected for other lost lands are included in the category of lands '*hereby granted.*'

Also in the case of the Burlington and Missouri grant, the only one of quantity without lateral limits recalled, where the land is to be obtained by *selection* anywhere along the line of the road, the language of the Act is that (Sec. 19, Act July 2, 1864, 13 St. 356), 'there be and hereby is *granted*,' provided the Company accepts '*this grant*' within one year, when the Secretary of the Interior 'shall *withdraw* the lands embraced in *this grant* from market.' And the Supreme Court in 98 U. S. 334, construing the Act, speak of it all the way through as a '*grant*,' and of the lands as '*granted lands*,' and uphold the right of the Company to select them anywhere along the general direction of the road within lines perpendicular to it at each end. * *

So in 24 Fed. Rep. p. 892, Barney v. Winona, it was held that the expression 'lands which may have been *granted* to the Territory or State of Minnesota,' include *all lands* the title to which had passed to the Territory or State of Minnesota, whether those lands were lands in place or *indemnity lands*, and that the word *granted* has the broad, rather than the narrow, signification.

So in St. Paul v. Winona Railroad, 112 U. S. 730, referring to the significant fact that both Acts there quoted speak of additional sections 'to be *selected*, a word wholly inapplicable to lands in place,' the Court said, 'we think, therefore, that these *additional lands granted* to the appellant * * * * are lands to be selected.'

These citations, doubtless, might be multiplied largely, but they are sufficient to show that the expressions '*lands granted*,' '*granted lands*,' '*lands within the grant*,' and similar expressions, have not such narrow and technical meaning as to restrict the use of them to lands in place, or within the primary limits of a grant."

These views of Secretary Noble are sustained by the decisions in the **Wiggs' case, 14 Saw. 574; Orton case, 16 Saw. 157; Barnes case, 51 N. W. Rep. 386; Araiza case, 57 Fed. Rep. 104.** And in **Woods v. Beach, 156 U. S.**

550–551, where the land in suit was within the *indemnity limits*, and the Act required the "Secretary to withdraw from market the *lands granted*", it was held:

"These withdrawals were not merely *executive* acts, but the latter one, at least, was in obedience to the *direct command of Congress.*"

AUTHORITIES ON LACHES, CITED AGAINST US.

Three decisions are cited by counsel to show that the delays complained of here constituted such laches as bars relief to appellant against appellees; of which decisions we have to say:

1. In *Gallagher v. Caldwell*, *145 U. S.*, *368–376*, cited by counsel, after saying (p. 373) "that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some *change in the condition or relations of the property or the parties*", the Court said, at page 375:

"It seems to us that equity forbids that homestead right, created fourteen years before, for which land office fees only were paid, which were once absolutely terminated, and which may never have been resurrected, should at this late day be permitted to disturb a title, legally perfect, created by the general government, after a decision adverse to any resurrection of such right, for which full value is paid, and on the face of which *costly improvements have been made*, and which now represents *enormous value*, to the creation of which appellant has, apparently, contributed nothing."

The difference between the facts there and here is the difference between *laches* and *inconsequential tardiness;* for there there was, and here there is not, a

"change in the condition or relation of the property or (and) the parties".

2. The grant construed in *Cedar Rapids v. Herring*, *110 U. S.*, *27–42*, relied on by appellants here, provided for withdrawal when a map "definitely showing this modified line of their road" was filed (p. 41); and that map was not filed "until December 1st 1867, three years and a half after the passage of the Act. * * * * It was during this delay of three years and a half that the entries were made under which the defendants hold the land" (p. 41). With these facts before it the Court (p. 41) held:

> "No *right* existed in the plaintiff to all these lands, or to any specific sections of them, during this period. No obligation of the government to *withdraw them* from sale arose until plaintiff *filed a map*, definitely showing the entire line of its road, in the General Land Office. The defendants purchased from officers who had the power to sell. They acquired a valid title."

The distinction between that case and this is too apparent to admit of comment. It will be remembered that his Cedar Rapids case was decided at a time when the withdrawal was regarded as dating from the *executive order* of withdrawal, instead of from the date the map was approved and accepted, as held later; which explains why an entry made a few days after the map was filed, but "before any action of the Secretary could be had to withdraw the lands" (p. 41), was sustained.

3. The case of *Curtner* v. *U. S 149 U. S. 662–679*, relied on by appellant has no application at all here.

That suit was brought in 1883 to cancel patents for land certified to California during the years 1870–1873 (p. 665), being odd sections within the *primary limits* of the Central Pacific grant, opposite a section of railroad definitely located in 1870 (p. 664). If railroad land, *legal title* passed to the Central Pacific in 1870—and if not railroad land then *legal title* passed to the State during the years 1870–1873; so that the *legal title*, as well as all equitable interest, had passed from the United States many years before the suit was brought. The adverse claimants under the State and railroad title were barred, as against each other, by the statute of limitation of actions—and the Court held (p. 662):

"When, in a suit in equity brought by the United States to set aside and cancel patents of public land issued by the Land Department, no fraud being charged, it appears that the suit is brought for the benefit of private persons, and the Government has no interest in the result, the United States are barred from bringing the suit if the persons for whose benefit the suit is brought would be barred."

Respectfully submitted,

WM. SINGER JR.
Of counsel for appellant.

No. 404.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CALIFORNIA REDWOOD COMPANY,

Appellant,

vs.

WILLIAM MAHAN,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

INDEX

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

THE CALIFORNIA REDWOOD COMPANY, a Corporation,

Plaintiff,

vs.

WILLIAM MAHAN,

Defendant.

Bill of Complaint.

To the Honorable, the Judges of the Circuit Court of the United States, for the Northern District of California:

The California Redwood Company, a corporation, having its principal place of business in the city and county of San Francisco, in the State of California, and being a citizen of the State, brings this its bill against William Mahan, a citizen of the State of California, residing in the county of Humboldt in said State, and therefore your orator complains and says:

I.

That at all of the times in this complaint mentioned the plaintiff was, and now is, a corporation, organized and existing under and by virtue of the laws of the State of California, and having its principal place of business and office in the city and county of San Francisco, in said State. That at all of the said times the lands hereinafter described were, and now are, unfit for cultivation, and valuable chiefly for the timber standing and growing thereon, and had no valuable deposit of gold, silver, cinnabar, copper, or coal, and that during the year 1883 said land was uninhabited, and contained no mining or other improvements.

II.

That on or about the second day of January, 1883, one John C. Johnson, who was then and there a citizen of the United States, over the age of twenty-one years, desiring to avail himself of the provisions of the act of Congress entitled "An act for the sale of timber land in the States of California, Oregon, Nevada, and in Washington Territory," approved June 3d, 1878, did file with the register of the United States land office of the Humboldt Land District, at the town of Eureka, in said county of Humboldt, a written statement in duplicate, wherein he designated by legal subdivisions the particular tract of land he desired to purchase, that is to say, the southwest quarter of section 15, township eight, north of range one east, Humboldt base and meridian, con-

taining 160 acres, according to the public surveys of the government of the United States; which written statement set forth that said land was then unfit for cultivation, and was valuable chiefly for its timber; that it was uninhabited, and had no mining or other improvements, or any valuable deposit of gold, silver, cinnabar, copper, or coal. Said written statement further set forth that said Johnson had made no other application under said act of Congress, and that he did not apply to purchase said land on speculation, but in good faith, to appropriate it to his own exclusive use and benefit, and that he had not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself. Said statement in duplicate was then and there signed by said Johnson, and was verified by his oath before the register of said United States land office of Humboldt Land District (in which district the said land was and is situate), and one of said duplicate statements, signed and verified by said applicant as aforesaid, was by the receiver of said land office transmitted forthwith to the general land office at Washington in the District of Columbia. Upon the filing of said statement, the said register of said land office did forthwith post in his office, for the period of sixty days, a notice of said application, embracing a description of said land by legal subdivisions, and did furnish to said applicant a copy of said notice, which was thereupon published at the expense of said applicant for a like period of sixty days in a newspaper printed and pub-

lished in said town of Eureka, in Humboldt county, which newspaper was then and there the newspaper published nearest to the location of said lands. That on the 21st day of March, 1883, and after said copy of said statement had been posted for the full period of sixty days, and had likewise been published as aforesaid for the full period of sixty days, no claim adverse to said claim of said applicant had been filed in said land office; and the said applicant did then and there furnish to the said register of said land office satisfactory evidence (which evidence was satisfactory to the said register) that said notice of said application, prepared by the register, had been duly published for the period of sixty days in the newspaper published nearest to the location of said lands, and further establishing that the said land was valuable chiefly for timber, and was unfit for cultivation, and was not included within military, Indian or other reservations of the United States, and had not been offered at public sale according to law prior to June 3d, 1878, and that it was subject to entry under said act of Congress, and was uninhabited and without improvements, and that it contained no valuable deposits of gold, silver, cinnabar, copper, or coal, and that all the averments in said written statement contained were true. And thereupon the said John C. Johnson did pay to the receiver of said land office of the Humboldt Land District the purchase money of said land, to-wit, the sum of two and one-half dollars per acre, in lawful money of the United States, together with all fees of the register and receiver of said land office, as provided for in the case of mining entries in the 12th section of the act of Congress approved May 10th, 1872; and thereupon

the said applicant was by said register and receiver permitted to enter, and he did enter, the said tract of land hereinbefore described, and the said receiver did execute and deliver to him a certificate of purchase of said land substantially in the words and figures following, to-wit:

No. 5118. Receiver's Office at Humboldt, Cala.

Duplicate.

March 21, 1883.

Received from John C. Johnson, of Humboldt county, California, the sum of four hundred (400) dollars and cents, being in full for the southwest quarter of section No. fifteen (15), in township No. eight (8), north of range No. one (1) east, H. M., containing one hundred and sixty (160) acres and 00-100, at $2.50 per acre. Act June 3d, 1878. Timber.

Recd. R. and R. fees for entry, $10.

(Signed) SOLOMON COOPER, Receiver.

$400.00

That said Solomon Cooper was then and there the duly appointed, commissioned, and qualified receiver of said land office of the Humboldt Land District. That thereafter, and on or about the said 21st day of March, 1883, said register and receiver did transmit to the general land office at Washington all of the testimony and papers in the matter of said application by said Johnson, including the duplicate of said certificate of purchase; and said papers and testimony were received and placed on file in the general land office in the month of March or April, 1883. That thereafter, and on the 23d

day of March, 1883, said John C. Johnson sold and conveyed all the said lands to one Charles E. Beach by deed of grant, bargain, and sale, duly signed and acknowledged by said Johnson, which deed was recorded during the year 1883 in the county recorder's office of said county of Humboldt. That thereafter, and on the 26th day of March, 1883, the said Charles E. Beach did convey all of said lands by deed of grant to Frank P. Hooper, John A. Hooper, and Josiah Bell, as cotenants, which deed was duly signed and acknowledged by said Beach, and was recorded on the 30th day of April, 1883, in liber 8 of Deeds, at page 456, in said county recorder's office.

That thereafter, and on the 27th day of July, 1883, said Frank P. Hooper John A. Hooper, and Josiah Bell did convey all of said lands heretofore described to this plaintiff, the California Redwood Company, by deed of grant, duly signed and acknowledged by them, the said grantors, dated July 27th, 1883, and recorded August 2d, 1883 in liber 9 of Deeds at page 402, in said county recorder's office. That thereafter, and on the seventh day of June, 1889, the commissioner of the general land office, did make and enter an order purporting and assuming to cancel said entry of said land by Johnson, and declaring said entry to be null and void, upon the pretended ground that said entry by Johnson had been procured to be made by said Charles E. Beach, and for the benefit of said Beach, and not of said Johnson. That said order was so made and entered by the commissioner of the general land office without any previous notice to your orator, and without any trial or hearing, and without any legal or competent evidence. That at the time

of its said purchase of said lands your orator was, and now is, entirely without any knowledge or notice that said entry by Johnson had been procured to be made by said Beach, or had been made for the benefit of said Beach, or of any person other than the said Johnson. That at the time of your orator's said purchase said entry by John C. Johnson was apparently legal and regular, and accepted by the land office authorities, and your orator, in good faith, believed said entry to be entirely valid, regular, and honest and believed that all of the statements contained in said application by Johnson were true; and therefore, relying upon said belief, and upon the record of said entry and of said subsequent transfers, your orator did, in the usual course of business and in good faith, purchase said lands from said Hoopers and Bell, and did pay to them the full value of said lands in exchange for their said deed to it.

That said entry by Johnson has never been waived, canceled, or relinquished to the United States in any manner by your orator, or by any of its predecessors in interest, and that said order of the commissioner of the general land office, purporting to cancel said entry was without jurisdiction, and was and is void.

That notwithstanding the said entry and payment by Johnson, William Mahan did thereafter, on or about the 11th day of September, 1889, apply for and enter said land above described in said land office at Eureka, in the form prescribed by said act of Congress of June 3d, 1878; and thereafter, and on the 10th day of March, 1891, a patent for said land, in the name of the United States, signed by the president and countersigned by the re-

corder of the general land office was issued to said William Mahan from the general land office at Washington. That said Mahan, at the time of his said application for said land, and at all times, had full knowledge and notice of said entry and payment therefor by Johnson, and of your orator's rights and claims thereunder, and that such pretended cancellation of said Johnson's entry was ineffectual and void.

That this action is brought to establish and declare your orator's rights arising under and by virtue of said act of Congress of June 3d, 1878, and that the value of said land exceeds the sum of two thousand dollars. That your orator can have no adequate relief at law.

Wherefore, your orator prays that this Honorable Court, by its decree, shall adjudge and declare that said defendant holds the title to the said lands as its trustee for the benefit of your orator, and that defendant convey said land to it in fulfillment of said trust, and that defendant, his heirs and assigns, and all persons claiming or to claim under him or them, be forever barred and enjoined from claiming any right, title, or interest in said lands adverse to your orator, and for such other relief as may be meet and equitable.

And your orator will ever pray, etc., etc.

May it please your Honors to grant unto your orator a writ of subpoena of the United States of America, directed to the said William Mahan, commanding him on a day certain to appear and answer unto this bill of complaint (but not under oath, an answer under oath being hereby expressly waived), and to abide and perform such order and decree in the premises as to the

Court shall seem proper and required by the principles of equity and good conscience.

PAGE, EELLS & WHEELER,
Solicitors for Complainant.

State of California,
City and County of San Francisco. } ss.

Charles Page, being duly sworn, deposes and says that he is president of the California Redwood Company; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information or belief, and that as to those matters he believes it to be true.

CHAS. PAGE.

Subscribed and sworn to before me 1st day of December, 1894.

[Seal] ALFRED A. ENQUIST,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 1st, 1894. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

Subpoena ad Respondendum.

United States of America.

Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

The President of the United States of America, Greeting, to William Mahan.

You are hereby commanded that you be and appear in said Circuit Court of the United States aforesaid, at the courtroom in San Francisco, on the fourth day of February, A. D. 1895, to answer a bill of complaint exhibited against you in said court by the California Redwood Company, being a corporation, and a citizen of the State of California, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of five thousand dollars.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 1st day of December, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the 119th.

[Seal of Circuit Court.]

W. J. COSTIGAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court U. S.—You are hereby required to enter your appearance in the above suit, on or before the first Monday of February next, at the clerk's office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

W. J. COSTIGAN,
Clerk.
By W. B. Beaizley,
Deputy Clerk.

[Endorsed]: United States Marshal's Office,
Northern District of California.

I hereby certify that I received the within writ on the 25th day of January, 1895, and personally served the same on the 28th day of January, 1895, on Wm. Mahan, by delivering to and leaving with Bridget Mahan, his wife, an adult person, who is a member of the family of Wm. Mahan, said defendant named therein, at the county of Humboldt, in said District, an attested copy thereof at the dwelling-house of said Wm. Mahan, one of said defendants herein.

San Francisco, February 1st, 1895.

BARRY BALDWIN,
U. S. Marshal.
By P. H. Maloney,
Deputy.

[Endorsed]: Filed February 1st, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

THE CALIFORNIA REDWOOD COMPANY, a Corporation,
Plaintiff,
vs.
WILLIAM MAHAN,
Defendant.

Answer.

The defendant, William Mahan, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in the bill of complaint filed herein, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering saith:

Admits the corporate existence of the plaintiff above named.

The said defendant alleges that he has no information, knowledge, or belief sufficient to enable him to answer the allegation that one John C. Johnson, a citizen of the United States, over the age of twenty-one years, filed a

written statement, as set forth in paragraph 2 of the plaintiff's complaint, wherein the land described in said paragraph was set forth, nor has defendant any information, knowledge, or belief sufficient to enable him to answer the allegation in said bill that upon the filing of said statement the register of the land office did post forthwith in his office, for the period of sixty days, a notice of said application, and therefore, placing his denial upon the ground of the want of such information, knowledge, or belief, denies that said written statement was filed, or that the said notice referred to in said paragraph was posted or published as averred in said complaint, or otherwise.

Defendant also denies, upon information and belief, that said Johnson did pay to the receiver of the land office of the Humboldt Land District the sum of two and one-half (2 1-2) dollars per acre for said land, amounting to the sum of four hundred (400) dollars; but alleges that said payment was made by the plaintiff herein; that said Johnson was merely used in that behalf by plaintiff as a "dummy," and an instrument to fraudulently enter said land for said plaintiff.

This defendant avers that he has no information, knowledge, or belief sufficient to enable him to answer the allegation that upon the 21st day of March, 1883, or at any other time, said register and receiver transmitted to the general land office at Washington the testimony or papers in the matter of said alleged application by said Johnson, and placing his denial upon that ground, he hereby denies the same; upon like ground defendant denies that said papers and testimony were received or

placed on file in the general land office in the month of March or April, 1883, or at any other time.

This defendant denies that on the 23d day of March, 1883, or at any other time, the said Johnson sold or conveyed the land described in said complaint to one Charles E. Beach, except and solely to this extent, viz: That at the time named, the said Johnson did execute to said Charles Beach a deed of grant, bargain, and sale of the said land, but alleges, upon information and belief, the rest to be that the said conveyance was not a sale of said land, and that no money or other consideration was given or paid by the said Beach for said land, and that the said conveyance was made pursuant to an agreement entered into theretofore by said Johnson and plaintiff, and before the filing of any application by said Johnson for the purchase of said land, to the effect that when the certificate of purchase of said land should be issued to said Johnson, that he was to convey and assign the same to the said Charles Beach; that said bargain and agreement was fraudulent and corrupt, contrary to the laws of the United States and the regulations of the land department of the United States government, and against public policy.

This defendant further alleges that as to the conveyance set forth and alleged in said paragraph of said complaint by the said Beach to Frank P. Hooper, John A. Hooper, and Josiah Bell, upon information and belief defendant avers that all of said conveyances were made without consideration, and in pursuance of the fraudulent and corrupt agreement and understanding last above named.

Defendant further alleges, upon information and belief, that all of the grantees in the above conveyance took the same with full and entire knowledge of the existence of said corrupt, fraudulent, and unlawful agreement and understanding.

Upon information and belief, defendant alleges that the said Johnson never paid to the receiver of the land office, the sum of four hundred (400) dollars, or any other sum of money, but that said sum of money was paid by the said Charles E. Beach, or some other person or persons, acting for and on behalf, and as the agent of the said plaintiff above named.

Defendant admits that on the 7th day of June, 1889, the commissioner of the general land office of the government of the United States did make an order canceling the said entry of said land, by the said Johnson, and declaring said entries to be null and void.

Defendant further avers, upon information and belief, that the said Beach and each and every of the said grantees and grantors, in the several conveyances in said complaint set forth, were, at the time of said conveyances, the agents, employees, officers, directors, or stockholders in said plaintiff corporation; that the said Beach and said grantors and grantees in all of said conveyances, as defendant avers, upon information and belief, acted under and in accordance with the instructions of the said plaintiff corporation, and they were acting in concert, and as the agents and representatives of said plaintiff, and for its benefit, and with its full knowledge and consent, and with the illegal and fraudulent object of giving to said plaintiff corporation a colorable title

to said land, and with the purpose of thereby depriving the United States of its title to the same, and the value thereof.

This defendant denies, upon information and belief, that the California Redwood Company was, or now is, without knowledge or notice that the said entry of said land by said Johnson had been procured to be made by the said Beach; denies that said plaintiff was ignorant that said entry was made for the benefit of said Beach; denies that the said plaintiff, in good faith, or at all, believed said entry to be valid, regular, or honest, or believed that the statements contained in the application of said Johnson for the said land were true; denies that, relying upon the belief that said statements were true, or upon the record, or upon subsequent or any transfers, the said plaintiff did, in the usual course of business, or otherwise, in good faith or otherwise, purchase said lands; denies that the said plaintiff did pay for said lands in value in exchange for the said debts; and denies that said plaintiff corporation did pay therefor the full or any value whatever of said interest, in exchange for the deed conveying the same.

Defendant further denies that the order of the commissioner of the general land office, canceling said entry was without jurisdiction, or was or is void; but, on the contrary, avers that said order making said cancellation was made upon due notice to this plaintiff and its predecessors in interest, in accordance with the laws governing the disposition of the public lands of the United States, and the regulations of the land department made in pursuance thereof.

And for another, further, and separate defense hereto the said defendant avers that William Mahan, the said defendant, upon due and proper proceedings had, upon the 11th day of September, 1889, did apply for and enter the said land in the land office at Eureka, in the form and manner prescribed by the act of Congress of June 3rd, 1878; and that thereafter, and on the 10th day of March, 1891, a patent for said land, in the name of the United States, signed by the President, and countersigned by the recorder of the general land office at Washington, was issued to said William Mahan from the general land office at Washington; that the said William Mahan made said entry in good faith, and without any knowledge or notice of any entry or payment for said land by the said Johnson, or of any pretended right or claim to said land by the said Johnson or his successors in interest, or any or either of them.

Defendant further avers that in making said cancellation of said entry by the said Johnson, the commissioner of the general land office acted within his jurisdiction upon ample evidence, with notice to all parties, and upon full proof and knowledge of the fraudulent character of the entry by the said Johnson, and of the corrupt understanding and agreement under which said entry was made by him, the said Johnson, for the benefit of this plaintiff.

Defendant therefore prays that the plaintiff take nothing and that he have judgment for costs, and that the bill of complaint be dismissed.

HENLEY & COSTELLO,
Attys. for Defendant.

State of California,
County of Humboldt. } ss.

William Mahan, being first duly sworn, deposes and says that he is the defendant in the above-entitled action; that he has read the within and foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on his information and belief, and as to those matters that he believes it to be true.

WM. MAHAN.

Subscribed and sworn to before me this 29 day of July, A. D. 1895.

A. T. CRANE,
Notary Public in and for the County of Humboldt, State of California.

Service of the within answer admitted this 7 day of Aug., 1895.

PAGE & EELLS,
Attorneys for Plff.

[Endorsed]: Filed Aug. 7th, 1895. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

IN EQUITY.

CALIFORNIA REDWOOD COMPANY,
Plaintiff,
vs.
WILLIAM MAHAN,
Defendant.
No. 12,015.

Replication to Answer.

The replication of the California Redwood Company to the answer of William Mahan, defendant:

This replicant, saving and reserving to itself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith:

That it will aver and prove its said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of said defendant is uncertain, untrue, and insufficient to be replied unto by this replicant, without this, that any other matter or thing whatsoever in said answer contained, material or effectual, in the law, to be replied unto, confessed and avowed, traversed

or denied, is true; all which matters and things this replicant is and will be ready to aver and prove as this Honorable Court shall direct, and humbly prays as in and by its said bill it hath already prayed.

PAGE & EELLS,
Solicitors for Plaintiff.

Service admitted Feby. 21, 1896.

HENLEY & COSTELLO,
Attys. for Deft.

[Endorsed]: Filed Feb. 24, 1896. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

IN EQUITY.

CALIFORNIA REDWOOD COMPANY, a Corporation, Plaintiff, vs. WILLIAM MAHAN, Defendant.	No. 12,015.

Amended Answer.

The defendant, by leave of the Court, files his amended answer as follows:

The defendants above named, now and at all times hereafter saving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had to the many errors, uncertainties, and imperfections in the bill of complaint filed herein, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, saith:

Admit the corporate existence of the plaintiff above named.

The said defendants allege that they have no information or belief sufficient to enable them to answer the allegation that John C. Johnson, a citizen of the United States, over the age of twenty-one years, filed a written statement as set forth in paragraph 2 of the plaintiff's complaint, wherein the land described in said paragraph was set forth, nor have defendants any information, knowledge, or belief sufficient to enable them to answer the allegation in said bill that upon the filing of said statement the register of the land office did post forthwith in his office, for the period of sixty days, a notice of said application, and therefore, placing their denial upon the ground of the want of such information, knowledge, or belief, deny that said written statement was filed, or that the said notice referred to in said paragraph was posted forth or published as averred in said complaint or otherwise; and upon information and belief deny that the statements and allegations in said written statement are or were true; deny that the said Johnson did not purchase the said land on speculation, but aver that the same was purchased by the plaintiff and its

predecessors in interest, they paying the purchase price thereof.

And defendant denies that the said Johnson paid said sum of money or any part thereof; denies that he purchased the said land to apply it to his own use or benefit, and denies that he has not made an agreement or contract whereby he agreed that the title which he might acquire to the said land might inure to the benefit of other persons than himself; avers that said Johnson did make the said application in so far as said application was made to purchase the said lands on speculation, and that it was so purchased by him not for his own use or benefit, but pursuant to an understanding, contract, and agreement which he made prior to the 2d day of January, 1883, to convey the title which he might acquire from the government of the United States to one Charles E. Beach who was at that time acting for and on behalf of the said plaintiff and its predecessors in interest.

Defendant also denies upon information and belief that said Johnson did pay to the receiver of the land office of the Humboldt Land District the sum of two and one-half (2 1-2) dollars per acre for said land, amounting to the sum of four hundred and six ($406) dollars or any other sum of money whatever; but allege that said payment was made by the plaintiff herein and their predecessors in interest; that said Johnson was merely used in that behalf by plaintiff and its predecessors in interest as a "dummy" and an instrument to fraudulently enter said land for said plaintiffs.

Defendant avers that he has no information, knowl-

edge, or belief sufficient to enable him to answer the allegation that upon the 6th day of July, 1883, or at any other time, said register and receiver transmitted to the general land office at Washington the testimony or papers in the matter of said alleged application by said Johnson, and placing their denial upon that ground, he hereby denies the same; upon like ground defendant denies that said papers and testimony were received or placed on file in the general land office in the month of July, 1883, or at any other time.

Defendant denies that on the 23d day of March, 1883, or at any other time, the said Johnson sold or conveyed the land described in said complaint to one Charles E. Beach, except and solely to this extent, viz., that at the time named the said Johnson did execute to the said Beach a deed of grant, bargain and sale of the said land, but alleges, upon information and belief, the fact to be that the said conveyance was not a sale of said land, and that no money or other consideration was given or paid by the said Beach for said land, and that the conveyance was made pursuant to an agreement entered into theretofore by said Johnson and plaintiff and before the filing of any application by said Johnson for the purchase of said land, to the effect that when the certificate of purchase of said land should be issued to said Johnson that he was to convey and assign the same to the said Beach; that said bargain and agreement was fraudulent and corrupt, contrary to the laws of the United States and the regulations of the land department of the United States government and against public policy.

The defendant further alleges that as to the conveyance set forth in said paragraph of said complaint by the

said Beach to Frank P. Hooper, John A. Hooper, and Josiah Bell, upon information and belief, that all of said conveyances were made without consideration and in pursuance of the corrupt and fraudulent agreement and understanding last above named.

That as to the conveyance set forth and alleged in said paragraph of said complaint by said Hoopers and Beach to the California Redwood Company, by deed dated July 27th, 1883, defendant avers upon information and belief that said conveyance was likewise without consideration and was made in pursuance of the corrupt and fraudulent agreement and understanding above referred to.

Defendant further alleges, upon information and belief, that all of the grantees in the above conveyance took the same with full and entire knowledge of the existence of said corrupt, fraudulent, and unlawful agreement and understanding.

Upon information and belief, defendant alleges that the said Johnson never paid to the receiver of the land office the sum of four hundred and six and 40-100 ($406.40) dollars or any other sum of money, but that said sum of money was paid by the said Beach or some other person or persons acting for and on behalf and as the agent of the said plaintiff above named.

Defendant admits that on the 7th day of June, 1889, the commissioner of the general land office of the government of the United States did make an order canceling the said entry of said land, by the said Johnson and declaring said entries to be null and void.

Defendant further avers upon information and belief that the said Beach and each and every of the said gran-

tees and grantors in the several conveyances in said complaint set forth, were at the time of said conveyance, the agents, employees, officers, directors, or stockholders in said plaintiff corporation; that the said Beach and the said grantors and grantees in all of said conveyances as defendant avers, upon information and belief, acted under and in accordance with the instructions of the said plaintiff corporation and they were acting in confederation and concert and as the agents and representatives of said plaintiff and for their benefit, and with their full knowledge and consent, and with the illegal and fraudulent object of giving to said plaintiff corporation a colorable title to said land, and with the purpose of thereby depriving the United States of its title to the same and the value thereof.

The defendant denies, upon information and belief, that the California Redwood Company was, or now is, without knowledge or notice that the said entry of said land by said Johnson had been procured by the said Beach; denies that the said plaintiff was ignorant that said entry was made for its benefit; denies that the said plaintiff in good faith, or at all, believed said entry to be valid, regular, or honest, or believed that the statements contained in the application of said Johnson for the said land were true; denies that relying upon the belief that said statements were true or upon the record, or upon subsequent or any transfers, the said plaintiff did, in the usual course of business, purchase said lands.

Defendant further denies that the order of the commissioner of the general land office canceling said entry was without jurisdiction or was or is void; but, on the contrary, avers that said order making said cancellation

was made upon due notice to plaintiff and its predecessors in interest, in accordance with the laws governing the disposition of the public lands of the United States, and the regulations of the land department made in pursuance thereof.

And for another, further, and separate defense hereto, the said defendant avers that on the 15th day of September, 1892, he did apply for and enter said land in the land office at Eureka, in the form and manner prescribed by the act of Congress of June 3d, 1878; and that thereafter, and on the 10th day of March, 1891, a patent for said land in the name of the United States, signed by the President and countersigned by the recorder of the general land office at Washington, was issued to the said defendant from the general land office at Washington; that the said entry was made in good faith, and without any knowledge or notice of any entry or payment for said land by the said Johnson or his successors in interest, or any or either of them.

Defendant further avers that in making said cancellation of said entry of the said Johnson the commissioner of the general land office acted within his jurisdiction upon ample evidence, with notice to all parties, and upon full proof and knowledge of the fraudulent character of the entry of the said Johnson, and of the corrupt understanding and agreement under which said entry was made by him, the said Johnson, for the benefit of this plaintiff.

For another and separate answer and defense hereto, defendant avers that he should have judgment herein, upon the ground that more than five years have elapsed

since the issuance by the United States government of its patent to the said land hereinbefore described to defendant; that the alleged equity relied upon by plaintiff is stale, and this action comes too late to entitle the plaintiff to any equitable relief herein.

And for another and separate answer and defense hereto defendant avers that the cause of action stated in said bill is barred by the provisions of sections 317, 318, 322 and 323, the 4th subdivision of section 333 and section 343 of the Code of Civil Procedure of the State of California.

Wherefore, defendant prays that this bill may be dismissed, and for judgment in his favor.

Dated February 3, 1897.

HENLEY & COSTELLO,
Attorneys for Defendant.

[Endorsed]: Filed April 10, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clerk.

In the Circuit Court of the United States, Ninth Circuit Northern District of California.

CALIFORNIA REDWOOD COMPANY,
Complainant,
vs.
WILLIAM MAHAN,
Respondent.
No. 12,015.

Enrollment.

The complainant filed its bill of complaint hereon on the 1st day of December, 1894, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, returnable on the 4th day of February, A. D. 1895, which is hereto annexed.

The respondent appeared herein on the 7th day of August, 1895, by Henley & Costello, Esqs., his solicitors.

On the 7th day of August, 1895, an answer was filed herein, which is hereto annexed.

On the 24th day of February, 1896, a replication to the answer was filed herein, which is hereto annexed.

On the 10th day of April, 1897, an amended answer was filed herein, which is hereto annexed.

Thereafter, on the 12th day of April, 1897, a final de-

cree was signed, filed, and entered herein, in the words and figures following, to-wit:

At a stated term, to-wit, the March term, A. D. 1897, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 12th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable WILLIAM W. MORROW, District Judge.

CALIFORNIA REDWOOD COMPANY, a Corporation, Complainant, vs. WILLIAM MAHAN, Defendant.	No. 12,015.

Decree.

This cause came on to be heard at the February, 1896, term of this Court, and was argued by Chas. P. Eells, Esq., counsel for the complainant, and by Barclay Henley, Esq., counsel for the defendant, and submitted to the Court for consideration and decision:

Whereupon, on consideration thereof, it is ordered, adjudged, and decreed that complainant's bill of complaint

herein be, and the same hereby is, dismissed, and that defendant recover from complainant his costs in this behalf expended, taxed at $.

WM. W. MORROW,
District Judge.

[Endorsed]: Filed and entered April 12th, 1897. W. J. Costigan, Clerk.

Certificate to Enrollment.

Whereupon, said pleadings, subpoena, final decree, and a memorandum of taxed costs are hereto annexed, said final decree being duly signed, filed, and enrolled, pursuant to the practice of said Circuit Court.

Attest, etc.

[Seal] W. J. COSTIGAN, Clerk.

[Endorsed]: Enrolled papers. Filed April 12th, 1897. W. J. Costigan, Clerk.

In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California.

IN EQUITY.

CALIFORNIA REDWOOD COMPANY,
Complainant,
vs.
WILLIAM MAHAN,
Respondent.
No. 12,015.

Opinion.

Bill in equity to have the respondent decreed to hold, in trust for the complainant, the legal title to a certain quarter section of land. Bill dismissed.

Messrs. PAGE, McCUTCHEN & EELLS, Solicitors for Complainant.

Messrs. HENLEY & COSTELLO, Solicitors for Respondent.

MORROW, District Judge.—This case presents substantially the same questions as were raised in the case of California Redwood Company v. B. S. Litle, No. 11,812, just decided, and upon the authority of that case, and of the case of American Mortg. Co. v. Hopper, 64 Fed. Rep. 553, the bill will be dismissed with costs.

[Endorsed]: Filed April 12, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

At a stated term, to-wit, the November term, A. D. 1896, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Wednesday, the 6th day of January, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: Honorable WILLIAM W. MORROW, District Judge.

CALIFORNIA REDWOOD CO.,
vs.
PETER BELCHER, Assignee, etc., et al. } No. 12,011.

CALIFORNIA REDWOOD CO.,
vs.
ARTHUR M. SMITH et al. } No. 12,013.

CALIFORNIA REDWOOD CO.,
vs.
WM. MAHAN. } No. 12,015.

Order that Testimony in Case of California Redwood Company v. Litle Apply to Other Cases.

These causes came on this day to be heard, Chas. P. Eells, Esq., appearing for complainant, and Barclay

Henley and B. F. Bergen, Esqs., appearing for defendants. By consent, ordered evidence adduced orally before the Court pursuant to 67th rule in equity. Complainant's Exhibits A, B, C, and D were introduced in evidence, and it was ordered that the testimony of F. P. Hooper given in previous case of Cal. Redwood Co. v. Litle, No. 11,812, in so far as the same is applicable, be considered as given in these cases. Complainant rested, and the causes were continued to 11 o'clock A. M. to-morrow.

Complainants' Exhibit "A"

This indenture, made the twenty-third day of March, in the year of our Lord one thousand eight hundred and eighty-three, between John C. Johnson, of the county of Humboldt, State of California, the party of the first part, and Charles E. Beach, of the same county and State, the party of the second part, witnesseth: That the said party of the first part, for and in consideration of the sum of four hundred dollars, gold coin of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, and sold, conveyed and confirmed, and by these presents does grant, bargain, and sell, convey and confirm unto the said party of the second part, and to his heirs and assigns, forever, all that certain lot, piece, or parcel of land situate, lying, and being in the said county of Humboldt, State of California, and bounded and particularly de-

scribed as follows, to-wit: The southwest quarter of section number fifteen (15), township number eight (8), north of range one (1), east of Humboldt meridian, and containing one hundred and sixty (160) acres.

Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold, all and singular, the said premises, together with the appurtenances, unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

Signed, sealed, and delivered in the presence of

FRED W. BELL.

his

JOHN C. X JOHNSON. [Seal]

mark

State of California, }
County of Humboldt. } ss.

On this twenty-third day of March, one thousand eight hundred and eighty-three, before me, Fred W. Bell, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared John C. Johnson, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the county of Humboldt, the day and year first above written.

[Seal] FRED. W. BELL,
Notary Public.

[Endorsed]: Deed. John C. Johnson to Charles E. Beach. Dated March 23, 1883. Recorded at the request of C. E. Beach, March 24th, A. D. 1883, at 20 minutes past 1 P. M., in book 8 of Deeds, page 14. Geo. A. Kellogg, Recorder. 12,015. Cal. Redwood Co. v. Mahan. Complainant's Exhibit "A." Filed Jan. 6, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clk.

Complainants' Exhibit "B."

This indenture, made the twenty-sixth day of March, in the year of our Lord one thousand eight hundred and eighty-three, between Charles E. Beach, of the county of Humboldt, State of California, the party of the first part, and F. P. and J. A. Hooper of the city and county of San Francisco, State of California, and Josiah Bell of the county of Humboldt, State of California, the parties of the second part, Witnesseth: That the said party of the first part, for and in consideration of the sum of two thousand two hundred dollars, gold coin of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell, convey, and confirm unto the said parties of the second part, and to their heirs and assigns, forever, all those certain lots, pieces, or parcels of land situate, lying, and

being in the county of Humboldt, State of California, and bounded and particularly described as follows, to-wit: the southwest quarter of section fifteen (15), the southwest quarter of section twenty-two (22), and the northwest quarter of section twenty-two (22), all in township eight (8), north of range one (1), East Humboldt meridian; also the southeast quarter of the northwest quarter, the northeast quarter of the southwest quarter, and the west half of the southwest quarter of section one (1), and lots two (2), three (3), and four (4), and the southwest quarter of northwest quarter of section one (1), in township eight (8), north of range one (1), West Humboldt meridian, and containing in all eight hundred and two (802) acres and twenty-five hundredths (25-100) of an acre, and conveyed to the parties of the second part hereto in proportion of interest as follows, to-wit: To F. P. Hooper, nine-twentieths (9-20) of the whole; to J. A. Hooper, nine-twentieths (9-20) of the whole, and to Josiah Bell, two-twentieths (2-20) of the whole. Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof.

To have and to hold all and singular the said premises, together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand and seal, the day and year first above written.

CHARLES E. BEACH. [Seal]

Signed, sealed, and delivered in the presence of
FRED W. BELL.

State of California, }
County of Humboldt. } ss.

On this twenty-sixth day of March, one thousand eight hundred and eighty-three, before me, Fred W. Bell, a notary public in and for said county, residing therein, duly commissioned and sworn, personally appeared Charles E. Beach, known to me to be the person described in and whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the said county of Humboldt, the day and year first above written.

[Seal] FRED W. BELL,
Notary Public.

[Endorsed]: Deed. Charles E. Beach to F. P. and J. A. Hooper and Josiah Bell. Dated March 26th, 1883. Recorded at the request of F. P. Hooper, Apr. 30th, 1883, at 45 minutes past 4 P. M., in book 8 of Deeds, page 456. Geo. A. Kellogg, Recorder. 11812. Cal. Redwood Co. v. Litle. Complainant's Exhibit "B." Filed Jan. 6,

1897. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clk; and also in 12,011, Complainant's Ex. "B"; 12,013, Complainant's Ex. "B," and 12,015, Complainant's Ex. "B." Filed Jan. 6, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clerk.

Complainants' Exhibit "C."

We, F. P. Hooper, J. A. Hooper, and Josiah Bell, grant to the California Redwood Company, a corporation organized and existing under the laws of the State of California, all that real property situate in the county of Humboldt, State of California, and described on and according to the official plat of the survey of said lands returned to the general land office of the United States at Washington, by the surveyor general, as follows:

The southeast quarter (S. E. $\frac{1}{4}$) of section number twenty-four (24), the east half of the northwest quarter (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$), the northeast quarter (N. E. $\frac{1}{4}$), the east half of the southwest quarter (E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$), and the southeast quarter (S. E. $\frac{1}{4}$) of section number twenty-five (25); the southeast quarter of the southwest quarter (S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$) of section number twenty-six (26), the east half (E. $\frac{1}{2}$), the east half of the northwest quarter (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$), and the east half of the southwest quarter (E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$) of section number thirty-five (35), and section number thirty-six (36), all in township number nine (9), north of range number one (1) west, Humboldt meridian.

Lots number one (1), two (2), three (3), and four (4), the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of

N. W. ¼), the southwest quarter of the northeast quarter (S. W. ¼ of N. E. ¼), the north half and the southwest quarter of the southwest quarter (N. ½ and S. W. ¼ of S. W. ¼) of section number one (1). Lots number one (1), two (2), and three (3), the south half of the northeast quarter (S. ½ of N. E. ¼) and the southeast quarter (S. E. ¼) of section number two (2), the northeast quarter and the south half of the northwest quarter (N. E. ¼ and S. ½ of N. W. ¼), and the east half (E. ½) of section number eleven (11); section number twelve (12); section number thirteen (13); the east half (E. ½) of section number fourteen (14); section number (twenty-four (24), lots one (1), two (2), four (4), and six (6). The northeast quarter of the northwest quarter (N. E. ¼ of N. W. ¼) and the northwest quarter of the northeast quarter (N. W. ¼ of N. E. ¼) of section number twenty-five in township number eight (8), north of range one (1) west, Humboldt meridian.

Section number sixteen (16), the northwest quarter of the southwest quarter (N. W. ¼ of S. W. ¼), and the south half of the southwest quarter (S. ½ of S. W. ¼); the northeast quarter of the southeast quarter (N. E. ¼ of S. E. ¼), and the south half of the southeast quarter (S. ½ of S. E. ¼); the south half of the northeast quarter (S. ½ of N. E. ¼), and the northeast quarter of the northeast quarter (N. E. ¼ of N. E. ¼) of section number nineteen (19), the * half of section number thirty (30), the southeast quar-

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*W. See deed of correction July 27, 1883. Lib. 9, Deeds, p. 623.

ter (S. E. $\frac{1}{4}$) of section number fifteen (15); section number thirty-six (36); an undivided one-half ($\frac{1}{2}$) interest in the east half of the southeast quarter (E. $\frac{1}{2}$ of S. E. $\frac{1}{4}$) of section number seven (7); in the southeast quarter of the northwest quarter (S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$); the northeast quarter of the northeast quarter (N. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$), and the south half of the northeast quarter (S. $\frac{1}{2}$ of N. E. $\frac{1}{4}$); the southeast quarter (S. E. $\frac{1}{4}$) and the southwest quarter (S. W. $\frac{1}{4}$) of section number eight (8) in section number seventeen (17); in the northwest quarter (N. W. $\frac{1}{4}$), the northeast quarter (N. E. $\frac{1}{4}$), the southeast quarter (S. E. $\frac{1}{4}$), and the north half of the southwest quarter (N. $\frac{1}{2}$ of S. W. $\frac{1}{4}$) of section number twenty (20); in section number twenty-one (21); in the southwest quarter of section number twenty-six (26); in the south half of section number twenty-seven (27); in the section number twenty-eight (28); in the northeast quarter (N. E. $\frac{1}{4}$), the southeast quarter (S. E. $\frac{1}{4}$), the southwest quarter (S. W. $\frac{1}{4}$), and the east half of the northwest quarter (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$) of section number twenty-nine (29); in the east half (E. $\frac{1}{2}$) of section number thirty (30); in the northeast quarter (N. E. $\frac{1}{4}$), the southeast quarter (S. E. $\frac{1}{4}$), the east half of the northwest quarter (E. $\frac{1}{2}$ of N. W. $\frac{1}{4}$), and the east half of the southwest quarter (E. $\frac{1}{2}$ of S. W. $\frac{1}{4}$) of section number thirty-one (31); in the section number (32); in the section number thirty-three (33); in the section number thirty-four (34); and in the section number thirty-five (35), all in township number nine (9), north of range number one (1) east, Humboldt meridian.

The northeast quarter (N. E. $\frac{1}{4}$) and the southeast quarter (S. E. $\frac{1}{4}$) of section number five (5); the southeast

quarter (S. E. ¼), and the southwest quarter (S. W. ¼) of section number seven (7); the southwest quarter (S. W. ¼) of section number fifteen (15); the southwest quarter of section number sixteen (16), the southeast quarter (S. E. ¼) and the southwest quarter (S. W. ¼) of section number seventeen (17); section number eighteen (18); section number nineteen (19); section number twenty (20); section number twenty-one (21); the northwest quarter and the southwest quarter (N. W. ¼ and S. W. ¼) of section number twenty-two (22); the northwest quarter (N. W. ¼) of section number twenty-seven (27); the northeast quarter (N. E. ¼), the northwest quarter (N. W. ¼), and the southwest quarter (S. W. ¼) of section number twenty-eight (28); section number twenty-nine (29); section number thirty (30); the northwest quarter (N. W. ¼), the northeast quarter (N. E. ¼), the east half of the southwest quarter (E. ½ of S. W. ¼), and the west half of the southeast quarter (W. ½ of S. E. ¼) of section number thirty-two (32), and the northwest quarter (N. W. ¼) of section number thirty-three (33).

And an undivided one-half (½) interest in section number two (2); in section number three (3); in section number four (4); in the northeast quarter (N. E. ¼) and southeast quarter (S. E. ¼) of section number (5); in the east half of the northwest quarter (E. ½ of N. W. ¼) and the northeast quarter (N. E. ¼) of section number eight (8); in the section number nine (9); in section number ten (10); in section number eleven (11); in the northwest quarter (N. W. ¼) and the southwest quarter (S. W. ¼) of section number (12), all in township number eight (8), north of range one (1) east, Humboldt meridian.

All rights of way over, across, and through, and all the timber and the rights to cut, remove, and appropriate the same standing upon the northwest quarter (N. W. $\frac{1}{4}$) of the section number fourteen (14), the southwest quarter (S. W. $\frac{1}{4}$), and the northwest quarter (N. W. $\frac{1}{4}$) of the section number eleven (11), and the southwest quarter of section number two (2) in township number eight (8), north of range one (1) west, Humboldt meridian.

Also all those certain town lots situate in the town of Trinidad, county of Humboldt, State aforesaid, and described on and according to the official map of said town as surveyed and platted by J. S. Murray, July 11th, 1871, and filed in the office of the county recorder of said county on October 2d, 1871, and now on file therein as follows:

Lots numbered one (1), two (2), three (3), four (4), five (5), nine (9), thirteen (13), fourteen (14), fifteen (15), thirty (30), thirty-one (31), thirty-four (34), thirty-seven (37), forty (40), and forty-two (42); all of the right, title, and interest of the grantors in lots number twenty-nine (29), forty-three (43), forty-five (45), and eight (8); and all rights of way and easements in lots numbered forty-one (41), forty-four (44), and twenty-one (21).

And all and every the other timber lands, town lots, and real property of the grantors, or any or either of them, situate in the said county of Humboldt, State of California.

And also all wharves, wharf privileges, rights, and franchises, railroads, superstructures for railroads, moor-

ings, anchors, and chains in Trinidad Bay, sawmills, shinglemills, blacksmith shops, boardinghouses, barns, stores and other buildings in said county.

Excepting, however, from this grant the following described real property belonging to said Josiah Bell, to-wit:

The southwest quarter (S. W. $\frac{1}{4}$) of section number fifteen (15), township nine (9), north range one (1), east Humboldt meridian; that portion of lot number twenty-nine (29) in the township of Trinidad, situate at the northeast (N. E.) corner of said lot, being about eighty (80) feet square, which is held in common by said Bell and one J. S. Baker; and that portion of lot number forty-five (45) in said town, which is held in common by said Bell and said J. S. Baker.

It is the intention of this grant to vest in the grantee all and every the timber lands, town lots, and real property, and all interests and rights therein possessed or claimed by the grantors, or any or either of them, situate in said Humboldt county, and which has heretofore been known as the property and plant of the "Trinidad Mill Company," that being the name and style of the copartnership heretofore existing between the grantors, saving and excepting only the premises described in the aforesaid exception.

And we, the said F. P. Hooper, J. A. Hooper, and Josiah Bell, covenant with the said the California Redwood Company that we, and each of us, and all persons acquiring any interest in the property hereby granted, or intended so to be, through or for us, or any of us, will,

on demand, execute and deliver to the said the California Redwood Company, at the expense of the latter, any further assurance of the same that may be reasonably required.

Witness, our hands this 27th day of July, A. D. 1883.

F. P. HOOPER. [Seal]
JOHN A. HOOPER. [Seal]
JOSIAH BELL. [Seal]

City and County of San Francisco. } ss.
State of California, }

On the twenty-seventh day of July, A. D. one thousand eight hundred and eighty-three, before me, James L. King, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared F. P. Hooper, J. A. Hooper, and Josiah Bell, known to me to be the individuals described in, whose names are subscribed to, and who executed the annexed instrument, and they severally acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, the day and year last above written.

[Seal] JAMES L. KING,
Notary Public.

[Endorsed]: F. P. Hooper and others to The California Redwood Company. Dated July 27th, 1883. Recorded at the request of Jno. A. Watson, agent Wells, Fargo & Co., August 2d, 1883, at 30 minutes past 3 P. M., in book

9 of Deeds, page 420, etc. Geo. A. Kellogg, Recorder. 11,812. Cal. Redwood Co. v. Litle. Complainant's Exhibit "C." Filed Jan. 6, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk. Also in 12,011, Complainant's Ex. "C"; 12,013, Complainant's Ex. "C," and 12,015, Complainant's Ex. "C." Filed Jan. 6, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Dep. Clerk.

Complainants' Exhibit "D."

"P."

W. E. V. J. R. M.

DEPARTMENT OF THE INTERIOR.

General Land Office,

Washington, D. C., February 28, 1896.

I, S. W. Lamoreux, commissioner of the general land office, do hereby certify that the annexed copy of entry papers in canceled timber land entry No. 5118 by John C. Johnson, for the S. W. $\frac{1}{4}$, sec. 15, T. 8 N., R. 1 E., H. M., Humboldt Land District, California, and other papers and correspondence relating thereto, is a complete, true, and literal exemplification of the originals as shown by the files and records of this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed at the city of Washington, on the day and year above written.

[Seal of Patent Office.]

S. W. LAMOREUX,

Commissioner of the General Land Office.

P.

S. S. T.
A. Y.
B. B. S.

87-132306.

DEPARTMENT OF THE INTERIOR.

General Land Office,
Washington, D. C., Mar. 8, 1888.

Register and Receiver, Humboldt, California.

Gentlemen: J. C. Johnson made timber land entry No. 5118, Mar. 21, 1883, of the S. W. ¼, sec. 15, tp. 8 N., R. 1 E., H. M., alleging on Nov. 28, 1887, Special Agent B. F. Bergen reported that he had made a personal examination of such tract, and found the land to be densely covered with redwood timber, for which it is chiefly valuable.

He further reports that, as shown by the county records, the land was conveyed to C. E. Beach, two days after entry, consideration $400, and that Beach, three days afterward, conveyed the land to T. P. Hooper and J. A. Hooper.

He further reports that he is convinced there was willful fraud in the entry, and that the entryman was in collusion with other parties when making the same, as he was a man of no means, and conveyed the land to Beach immediately after entry for less than it would cost to make such entry. Said entry is accordingly held for cancellation.

You will give claimant due notice of this action, informing him of the nature and substance of the special agent's report, as set forth above, and advising him that he will be allowed sixty days in which to apply for a hearing to show cause why his entry should be sustain-

ed, in accordance with circular instructions of July 31, 1885, as amended by the circular of May 24, 1886, and that if he fails to show cause why his entry should be sustained, the same will be finally canceled.

If you have knowledge that the land has been transferred or mortgaged, you will also notify the transferee or mortgagee.

Respectfully,

S. M. STOCKSLAGER,

Acting Commissioner.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.

Eau Claire
May 4
5:30 p. m.
1888
Wis.

and date of delivery

1-89—11050—11

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.

and date of delivery.

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.

Eureka, Cal.
May 25
3 p. m.
1888

and date of delivery.

1889—11050—15

Name of Sender U. S. Land Office

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 343 from Post Office at _____ Registered May, 16 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **H. C. PUTNAM**

EAU CLARIE

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED {*LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

H. C. PUTNAM

KLINGENBERG

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 91 from Post Office at _____ Registered Jul. 12, 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **A. R. STEWART**

E

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED {*LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee the name of both addressee and recipient must appear.

Signature in ink.

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 301 from Post Office at _____ Registered May. 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **A. C. WINZLER**

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED {*LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

A. C. WINZLER

* Erase letter or parcel according to which is sent.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Chicago, S. W. D.
S. J. A. Jan. 23
Reg.
and date of delivery.

1889—11050—6

Name of Sender U. S. Reg. 34060

Street and Number, or Post Office Box.

Post Office at Eureka,

County of ____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Eureka, Cal.
July 17, 9 a. m.
1888
and date of delivery.

1889—11050—3

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of ____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Eureka, Cal.
May 31
1888
and date of delivery.

1889—11050—18

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of ____ *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 57 from Post Office at _____ Registered Jan. 11, 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **T. W. HARVEY**

C

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

T. W. HARVEY

by R. H. HOOVEY

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 216 from Post Office at _____ Registered Jul. 12 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **H. L. SMITH**

E.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

H. L. SMITH

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 324 from Post Office at _____ Registered May 11, 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **H. L. SMITH**

E.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

HORACE L. SMITH

* Erase letter or parcel according to which is sent.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Eau Clarie
Jul. 23
5:30 p. m.
1888
Wis.
and date of delivery.

1-89—11050—17

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Chicago, Ill.
May 18
9:30 p. m.
88
and date of delivery.

1889—11050—9

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Eureka, Cal.
May 31
188
and date of delivery.

1889—11050—10

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 86 from Post Office at _____ Registered Jul 12 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to H. C. PUTNAM

EAU CLARIE

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED {*LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

H. C. PUTNAM

KLINGENBERG

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 319 from Post Office at _____ Registered May 11, 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to W. H. SWIFT

C

After obtaining receipt below, the Post... ter will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED {*LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

W. H. SWIFT

M. C. SABIN

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 312 from Post Office at _____ Registered May 1[illegible] 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to H. L. SMITH

E.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED {*LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

HORACE L. SMITH

* Erase letter or parcel according to which is sent.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Chicago
May 22
6:30 p. m.
and date of delivery.

1889—11050—14

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Eau Claire
May21
5:30 p. m.
1888
and date of delivery.

1889—11050—13

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Como
May 14
1888
C
and date of delivery.

1889—11050—16

Name of Sender U. S. L. O.

Street and Number, or Post Office Box.

Post Office at Eureka,

County of Humboldt, *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 344 from Post Office at _____ Registered May 16, 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to W. H. SWIFT

C

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

W. H. SWIFT

M. C. SABIN

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 321 from Post Office at _____ Registered May 11 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to H. C. PUTNAM

EAU CLAIRE

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

H. C. PUTNAM

by KLINGENBERG

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 309 from Post Office at _____ Registered May 9, 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to CHAS. HANSEN, Comr.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

C. HANSEN

* Erase letter or parcel according to which is sent.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO: 22967

Stamp here name of Post Office.
New York
May 25
2:30 P. M.
88
and date of delivery.

1889—11050—12

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Eureka,
June 1
3 p. m. 1888
Cal.
and date of delivery.

1889—11050—8

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at _____

County of Humboldt, *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Eureka
May 18
Cal.
and date of delivery.

1889—11050—7

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 301 from Post Office at _____ Registered May 15 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **R. S. WALKER**

N. Y.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

GEO. CEISEL

R. S. WALKER

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 216 from Post Office at _____ Registered May 5 1888 Eureka, Cal., E.

*Reg. Letter / Reg. Parcel } Addressed to **H. L. SMITH**

E.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

HORACE L. SMITH

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 300 from Post Office at _____ Registered May 18 188s Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **S. F. BALCOM**

E.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

S. F. BALCOM

* Erase letter or parcel according to which is sent.

United States Land Office,
Humboldt, California, May 9, 1888.

S. F. Balcom, Esq., Eureka, Cal.

Sir: You are hereby notified that the following timber land cash entries have been held for cancellation by Department Letters "P," of Mar. 2, 8, 29, April 17, and 19th, 1888, upon reports of Special Agent B. F. Bergen to the effect that the said entries were severally made in the interest of other parties.

T. L. C. E. No. 5080, made Mar. 12, 1883, by Wm. C. Robertson, for S. ½ of N. E. ¼, and lots 1 and 2, sec. 2, tp. 8 N., r. 2 E., H. M.

T. L. C. E. No. 5097, made Mar. 19, 1883, by James A. Mead, for S. E. ¼, sec. 3, tp. 9 N., R. 1 E., H. M.

T. L. C. E. No. 5247, made May 18, 1883, by John G. Sherman, for W. ½ of N. W. ¼ and W. ½ of S. W. ¼, sec. 15, tp. 13 N., R. 1 E., H. M.

T. L. C. E. No. 5267, made May 21, 1883, by Alfred C. Winzler, for N. E. ¼, sec. 34, tp. 13 N., r. 1 E., H. M.

T. L. C. E. No. 5343, made June 2, 1883, by Albert Foster, for N. ½ of N. E. ¼ sec. 9, W. ½ of S. W. ¼, sec. 1, tp. 8, N. R. 1 E., H. M.

T. L. C. E. No. 5344, made June 2, 1883, by Edward Hall for S. E. ¼ of N. E. ¼, E. ½ of S. E. ¼, and lot 1, sec. 4, tp. 8, N. R. 1, E., H. M.

T. L. C. E. No. 5347, made June 3, 1883, by James O. Dermott for S. ½ of N. W. ¼, and lots 3 and 4, sec. 3, tp. 8, N. R. 1 E., H. M.

T. L. C. E. No. 5348, made June 4, 1883, by Charles Hansen, for S. E. ¼, sec. 34, tp. 13, N. R. 1 E., H. M,

T. L. C. E. No. 5474, made July 9, 1883, by Thomas Williamson, for S. W. ¼, sec. 9, tp. 7, N. R. 2 E., H. M.

T. L. C. E. No. 5477, made July 9, 1883, by Charles Brown, for S. ½ of S. W. ¼, N. W. ¼ of S. W. ¼, sec. 21, S. W. ¼ of N. E. ¼, sec. 28, tp. 7, N. R. 2 E., H. M.

T. L. C. E. No. 5478, made July 9, 1883, by Perry Connor, for N. W. ¼, sec. 28, tp. 7, N. R. 2 E., H. M.

T. L. C. E. No. 5480, made July 9, 1883, by David Ellis, for S. W. ¼, sec. 23, tp. 7 N. R. 2 E., H. M.

T. L. C. E. No. 5482, made July 9, 1883, by Henrietta Morton, for N. W. ¼, sec. 14, tp. 7, N. R. 2 E., H. M.

T. L. C. E. No. 5484, made July 9, 1883, by Edward T. Knaack for S. E. ¼, sec. 15, tp. 7, N. R. 2 E., H. M.

Also, T. L. C. E. No. 4973, made Feby. 24, 1883, by James Gibson, for N. E. ¼, sec. 27, tp. 9, N. R. 2 E., H. M.

T. L. C. E. No. 4975, made Feby. 24, 1883, by James Gregory, for S. E. ¼ of N. W. ¼, S. W. ¼ of N. E. ¼, and lots 4 and 5, sec. 6, tp. 9, N. R. 2 E., H. M.

T. L. C. E. No. 5104, made March 19, 1883, by Walter Carrier, for N. E. ¼, sec. 13, tp. 9, B. R. 1 E., H. M.

T. L. C. E. No. 5320, made May 29, 1883, by George Speed, for N. E. ¼, sec. 27, tp. 13, N. R. 1 E., H. M.

T. L. C. E. No. 5483, made July 9, 1883, by Oscar A. Betterley for N. E. ¼, sec. 15, tp. 7, N. R. 2 E., H. M.

Also, T. L. C. E. No. 5118, made March 21, 1883, by J. C. Johnson, for S. W. ¼, sec. 15, tp. 8, N. R. 1 E., H. M.

T. L. C. E. No. 5120, made March 21, 1883, by Augustus Keyser, for N. W. ¼, sec. 22, tp. 8, N. R. 1 E., H. M.

T. L. C. E. No. 5121, made March 21, 1883, by William Beach for S. E. ¼ of N. W. ¼, N. E. ¼ of S. W. ¼, and W. ½ of S. W. ¼, sec. 1, tp. 8, N. R. 1 W., H. M.

T. L. C. E. No. 5122, made March 21, 1883, by Jennie Beach, for S. W. ¼ of N. W. ¼, and lots 2, 3, and 4, sec. 1, tp. 8, N. R. 1 W., H. M.

Also, T. L. C. E. No. 5596, made August 16, 1883, by William L. Baldwin for N. W. ¼, sec. 27, tp. 9, N. R. 1 E., H. M.

Also, T. L. C. E. No. 5457, made July 5, 1883, by William Romer, for lots 1 and 2, and S. ½ of N. E. ¼, sec. 3, tp. 12, N. R. 1 E., H. M.

Also, T. L. C. E. No. 5078, made March 12, 1883, by John Christie, for N. ½ of N. W. ¼, sec. 35, S. E. ¼ of N. E. ¼, sec. 9, S. E. ¼ of N. E. ¼ sec. 4, tp. 9, N. R. 2 E., H. M.

T. L. C. E. No. 5195, made May 10, 1883, by John L. Mauer, for S. E. ¼ of S. E. ¼, sec. 21, N. ½ of N. E. ¼, sec. 28, tp. 7, N. R. 2 E., H. M.

T. L. C. E. No. 5492, made July 9, 1883, by Christen Christenson, for N. W. ¼ of S. W. ¼, sec. 28, S. E. ¼ of N. W. ¼, sec. 21, N. E. ¼ of N. W. ¼, sec. 22, S. W. ¼ of S. W. ¼, sec. 11, T. 7, N. R. 2 E., H. M.

You are hereby advised that you will be allowed sixty (60) days in which to apply for a hearing to show cause why said entries should be sustained, in accordance with circular instructions of July 31, 1885, as amended by the circular of May 24, 1886, and that if you fail to show

cause why said entries should be sustained, the same will be finally canceled.

Respectfully,

S. C. BOOM,

Register.

B.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS.

RETURN TO:

Post Office at { Stamp here name of Post Office. and date of delivery.

Name of Sender U. S. Land Office

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 278 from Post Office at _____ Registered May, 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to J. C. JOHNSON

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED {*LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

_____

Signature in ink.

* Erase letter or parcel according to which is sent.

1889—6272—2

United States Land Office,
Humboldt, California, May 9, 1888.

J. C. Johnson, Esq.

Sir: By instructions of Department Letter "P," of Mar. 8, 1888, you are hereby advised that your T. L. C. E. No. 5118 for S. W. ¼, sec. 15, tp. 8 N., R. 1 E., H. M., made Mar. 21, 1883, has been held for cancellation upon the report of Special Agent B. F. Bergen, to the effect that the said entry was made in the interests of other parties.

Made Novr. 28, 1887.

You are hereby informed that you will be allowed sixty days to apply for a hearing to show cause why your said entry should be sustained, and that if you fail to show cause why your entry should be sustained, the same will be finally cancelled.

Respectfully,
S. C. BOOM,
Register.
B.

(No. 1525.)

5, '18, 188.

Mr. J. C. Johnson,

Please apply in person, or send written order, for a registered letter to your address in this office.

P. M.

N. B.—Registered letters or parcels must never be delivered to any persons but those to whom they are addressed, or upon their written order. Identification

must be required when the applicant is unknown, and written orders must be verified and placed on file as vouchers. Postmasters will be held responsible for the wrong delivery of registered matter. (See sections 868-869, Postal Laws and Regulations, edition 1879.)

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
Dowsprairie
12
May
Cal.
and date of delivery.

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.
San Francisco
May 14
2 p. m.
Cal.
and date of delivery.

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of _____ *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 317 from Post Office at _____ Registered May 11 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **C. E. BEACH**

Dowsprairie

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

C. E. BEACH

JOHN FLAHERTY Signature in ink.

* Erase letter or parcel according to which is sent.

1889—6927

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 322 from Post Office at _____ Registered May 11 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to **F. P. & J. A. HOOPER, S. F.**

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL 247

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

F. P. & J. A. HOOPER

Signature in ink.

* Erase letter or parcel according to which is sent.

1—2769—6881

United States Land Office,
Humboldt, Cal., Jany. 8, 1889.

Hon. Commissioner, Gen. Land Office, Washington, D. C.

Sir: In reply to your Letter "P" of Dec. 27, '88, relating to the entry of J. C. Johnson, No. 5118, held for cancellation under report of Special Agt. Bergen, I will say that our records show that C. A. Beach and Hooper Brothers were notified May 11 and May 14, 1888, per reg. letters, the entryman cannot be found nor is he known, no hearing having been applied for through this office as yet.

Respy,
R. W. HUTCHINS,
Receiver.

(On reverse side of letter.)

General Land Office.

15-382.
E. G. F.

6627

Jan. 17, 1889.

B. B.

Received.
U. S. Land Office, Humboldt, Cal.
Letter replying to Letter "P.," Dec. 27, '88.
R. W. HUTCHINS, Rec.
C. E. 5118.

86. 61218.
87. 132306.

Entryman not notified—not found.

Jan. 22, '89. To R. & R., S. S. T., for report.

Cancelled June 7, '89. See '89—6272. S. S. T.

P. 37-7. S. S. T.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.

and date of delivery.

Name of Sender U. S. L. O.

Street and Number, or Post Office Box.

Post Office at Eureka,

County of Humboldt, *State of* California.

When the registered letter or parcel accompanying this card is delivered, the Postmaster will require signature to the receipt on the other side, also on his record of registered deliveries, and mail this card without cover to address below.

A penalty of $500 is fixed by law for using this card for other than official business.

Post Office Department.

OFFICIAL BUSINESS. **Post Office at**

RETURN TO:

Stamp here name of Post Office.

Eureka
9 a. m.
1889

and date of delivery.

Name of Sender U. S. L. O.

Street and Number, or Post Office Box. Eureka,

Post Office at Humboldt,

County of ——— *State of* California.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 530 from Post Office at _____ Registered Mar. 14. 1888 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to JNO. C. JOHNSON

F

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

Signature in ink.

* Erase letter or parcel according to which is sent.

REGISTRY RETURN RECEIPT sent _____ 189 .

Reg. No. 605 from Post Office at _____ Registered Mar. 15. 1889 Eureka, Cal.

*Reg. Letter / Reg. Parcel } Addressed to D. EVANS

E.

After obtaining receipt below, the Postmaster will mail this Card, without cover and without postage, to address on the other side.

RECEIVED THE ABOVE DESCRIBED REGISTERED { *LETTER / PARCEL

(SENDER'S NAME ON OTHER SIDE.)

Sign on dotted lines to the right.

When delivery is made to other than addressee, the name of both addressee and recipient must appear.

DAVID EVANS

Signature in ink.

* Erase letter or parcel according to which is sent.

United States Land Office,
Humboldt, Cal., March 11, 1889.

John C. Johnson, Trinidad, Cal.

Sir: By Department Letter "P" of March 8, 1888, this office is ordered to notify you that your timber entry 5118 for S. W. ¼, 15, tp. 8, N. R. 1 E., H. M., had been held for cancellation upon a report of Special Agent Bergen, to the effect that the entry was made in the interest of Hooper Brothers of San Francisco, and through the agency of C. E. Beach to whom you conveyed the land. You are advised that you will be allowed sixty days from date to apply for a hearing to show cause why your entry should be sustained, and if you fail to do this, the entry will be finally cancelled.

Very respy.,
S. C. BOOM, Register.
R. W. Hutchins, Receiver.

United States Land Office,
Humboldt, Cal., May 15, 1889.

Hon. Commissioner, Gen. Land Office, Washington, D. C.

Sir: Referring to your Letter "P" of Mch. 8, 1888, and Jany. 22, 1889, in regard to timber land entry 5118 by John C. Johnson for the S. W. ¼ of sec. 15, tp. 8 N., R. 1 E., H. M., held for cancellation upon report of Special Agt. Bergen to the effect that the entry was made in the interest other parties I have the honor to say that John C. Johnson had reg. letter sent to his last known P. O.

address March 14 1889, and David Evans was notified by reg. letter 605, March 15, 1889, and as yet no response.

Respy.,

R. W. HUTCHINS,

Receiver.

(On reverse side of letter is following:)

1889. General Land Office, May 25 16,352.
6272. B. B.
Received.

Letter in reply to Letter "P" of Jan. 22, '89. Refers to T. L. C. 5118.

By JOHN C. JOHNSON,

R. W. Hutchins,

Rec.

86-61218.
87-132306.
89-6927.

Canceled June 7, '89. S. S. T.
P. S. S. T.
P. S. S. T.
A. Y.

DEPARTMENT OF THE INTERIOR.

87-132306.
89. 6927. General Land Office,
62721. Washington, D. C., June 7, 1889.
Register and Receiver, Humboldt, California.

Gentlemen: By letter of March 8, 1888, tim. land entry No. 5118, of John C. Johnson for the S. W. $\frac{1}{4}$, sec. 15,

tp. 8 N., R. 1 E., H. M., was held for cancellation upon report of Special Agent B. F. Bergen.

I am in receipt of your letters of May 8 and 15, 1889, stating that the claimant was duly notified, and that the time has expired without his taking any action in the matter.

Said entry is accordingly this day canceled. You will so note on your records, and hold the land subject to entry by the first qualified applicant. Also note the cancellation on the entry papers which are now in your office.

Respectfully,

W. M. STONE,

Acting Commissioner.

(4-537.)

Sworn Statement Under Act of June 3, 1878.

Land Office at Humboldt, Cala.

Dec. 27th, 1882.

I, John C. Johnson, of Humboldt county, California, desiring to avail myself of the provisions of the act of Congress of June 3, 1878, entitled "An act for the sale of timber lands in the State of California, Oregon, Nevada and in Washington Territory," for the purchase of the S. W. ¼ of section 15, township 8, north of range 1 east, H. M., do solemnly swear that I am a ~~naturalized~~ native citizen of the United States, and over 21 years of age, that the said land is unfit for cultivation, and valuable chiefly for its timber; that it is uninhabited; that it contains no mining or other improvements, nor, as I verily

believe, any valuable deposit of gold, silver, cinnabar, copper, or coal; that I have made no other application under said act; that I do not apply to purchase the land above described on speculation, but in good faith to appropriate it to my own exclusive use and benefit, and that I have not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whomsoever, by which the title which I may acquire from the government of the United States may inure in whole or in part to the benefit of any person except myself.

his
JOHN X C. JOHNSON.
mark

Sworn to and subscribed before me this 27th day of December, 1882.

SOLOMON COOPER,
Receiver.

In case the party has been naturalized or has declared his intention to become a citizen, a certified copy of his certificate of naturalization or declaration of intention, as the case may be, must be furnished.

[Endorsed]: Timber Lands —, Act of June 3, 1878. Sworn Statement. Land Office at Humboldt, Cal. Sec. 15, township 8, north, range 1 E., H. M. John C. Johnson. Dec. 27, 1882.

(4-371.)

(The testimony of two witnesses, in this form, taken separately, required in each case.)

Testimony of Witness under Act of June 3, 1878.

Manson Auger, being called as a witness in support of the application of John C. Johnson to purchase the S. W. $\frac{1}{4}$ of section 15, township 8 of range 1 east, H. M., testifies as follows:

Ques. 1. What is your postoffice address, and where do you reside?

Ans. Eureka, Humboldt county, Cala., where I now reside.

Ques. 2. What is your occupation?

Ans. Lumberman.

Ques. 3. Are you acquainted with the land above described by personal inspection of each of it, smallest legal subdivisions? Ans. I am.

Ques. 4. When and in what manner was such inspection made?

Ans. I have resided near the land for the past six years, and during that time have frequently traveled over the same.

Ques. 5. Is it occupied; or are there any improvements on it not made for ditch or canal purposes or which were not made by, or do not belong to, the said applicant?

Ans. It is not occupied and it is not improved.

Ques. 6. Is it fit for cultivation? Ans. No.

Ques. 7. What causes render it unfit for cultivation?

Ans. Poor soil, rough and broken surface, and the fact of its being heavily timbered.

Ques. 8. Are there any salines or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable?

Ans. None to my knowledge.

Ques. 9. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. It is chiefly valuable for the growth of timber thereon.

Ques. 10. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. From the fact of its being covered with timber, poor soil, and rough and broken surface.

Ques. 11. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the government of the United States may inure in whole or in part to the benefit of any person except himself?

Ans. I do not know that he has.

Ques. 12. Are you in any way interested in this application, or in the lands above described, or the timber or stone, salines, mines, or improvements of any description whatever thereon? Ans. No. I am not,

MANSON AUGER.

I hereby certify that witness is a person of respectability; that each question and answer in the foregoing

testimony was read to him before he signed name thereto, and that the same was subscribed and sworn to before me this thirteenth day of March, 1883.

SOLOMON COOPER,
Receiver.

Note.—The office before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

Title LXX.—Crimes.—Ch. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states and subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See 1750.)

[Endorsed]: Timber Lands. Act of June 3, 1878. Testimony of witness. Land Office at Humboldt, Cala. Section 15, Township 8, N., Range 1 E.

(4-371.)

The testimony of two witnesses, in this form, taken separately, required in each case.)

Testimony of Witness under Act of June 3, 1878.

John Maguire being called as a witness in support of the application of John C. Johnson to purchase the S. W. ¼ of section 15, township 8, north of range 1 east, H. M., testifies as follows:

Ques. 1. What is your postoffice address, and where do you reside?

Ans. Trinidad, Humboldt county, Cala., where I now reside.

Ques. 2. What is your occupation?

Ans. Farmer.

Ques. 3. Are you acquainted with the land above described by personal inspection of each of it, smallest legal subdivisions?

Ans. I am.

Ques. 4. When and in what manner was such inspection made?

Ans. I have resided near the land for the past ten years, and during that time have frequently traveled over the

Ques. 5. Is it occupied, or are there any improvements on it not made for ditch or canal purposes or which were not made by, or do not belong to, the said applicant?

Ans. It is not occupied and is not improved.

Ques. 6. Is it fit for cultivation? Ans. No.

Ques. 7. What causes render it unfit for cultivation?

Ans. Poor soil, rough and broken surface, and the fact of its being heavily timbered.

Ques. 8. Are there any salines, or indications of deposits of gold, silver, cinnabar, copper, or coal on this land? If so, state what they are, and whether the springs or mineral deposits are valuable.

Ans. None to my knowledge.

Ques. 9. Is the land more valuable for mineral or any other purposes than for the timber or stone thereon, or is it chiefly valuable for timber or stone?

Ans. It is chiefly valuable for the growth of timber thereon.

Question. From what facts do you conclude that the land is chiefly valuable for timber or stone?

Ans. From the fact of its being covered with timber, poor soil, and rough and broken surface.

Ques. 11. Do you know whether the applicant has directly or indirectly made any agreement or contract, in any way or manner, with any person whomsoever, by which the title which he may acquire from the government of the United States may inure in whole or in part to the benefit of any person except himself?

Ans. I do not know that he has.

Ques. 12. Are you in any way interested in this application, or in the lands above described, or the timber or stone, salines, mines, or improvements of any description whatever thereon? A. No. I am not.

JOHN MAGUIRE.

I hereby certify that witness is a person of respectability; that each question and answer in the foregoing

testimony was read to him before he signed name thereto, and that the same was subscribed and sworn to before me this thirteenth day of March, 1883.

SOLOMON COOPER,

Receiver.

Note.—The officer before whom the testimony is taken should call the attention of the witness to the following section of the Revised Statutes, and state to him that it is the purpose of the government, if it be ascertained that he testifies falsely, to prosecute him to the full extent of the law:

Title LXX.—Crimes.—Ch. 4.

Sec. 5392. Every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states and subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment at hard labor, not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment against him is reversed. (See 1750.)

[Endorsed]: Timber Lands. Act of June 3, 1878. Testimony of witness. Land Office at Eureka, Cala. Section 15, township 8, N. range 1 E.

(2-062.)

Nonmineral Affidavit

State of California.
County of Humboldt, } ss.

John Maguire, being duly sworn according to law, deposes and says that the S. W. ¼ of sec. 15, township 8, north range 1 east, H. M., that he is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that his knowledge of said land is such as to enable him to testify understandingly with regard thereto; that there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially nonmineral land, and that his application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for timber purposes.

JOHN MAGUIRE.

Subscribed and sworn to before me this 13th day of March, A. D. 1883, and I hereby certify that the foregoing affidavit was read to the said John Maguire previous to his name being subscribed thereto; and that deponent is a respectable person, to whose affidavit full faith and credit should be given.

SOLOMON COOPER,
Receiver.

Timber Land Notice.

U. S. Land Office, Humboldt, Cal.
Dec. 27, 1882.

Notice is hereby given, to whom it may concern, that John C. Johnson, of Eureka, Humboldt county, Cal., has made application to the government of the United States to purchase the following described tract of timber land under the provisions of an act for the sale of timber land in California, Oregon, Nevada, and Washington Territory, approved June 3, 1878, to-wit:

The S. W. $\frac{1}{4}$ of sec. 15, T. 8, N. R. 1 E., H. M., containing 160 acres.

All persons holding adverse claim thereto are hereby required to present the same before the register and receiver within sixty days from the date hereof, or the entry will be perfected under the provisions of said act.

j 6 w i ot. C. F. ROBERTS,
Register.

(4-227.)

Certificate as to Posting of Notice.

Land Office at Humboldt, Cala.

March 21st, 1883.

I, C. F. Roberts, register, do hereby certify that a notice a printed copy of which is hereto attached, was by me posted in a conspicuous place in my office for a period of sixty days, I having first posted said notice on the 27th day of Dec., 1882.

C. F. ROBERTS,

j b w iot. Register.

Timber Land Notice.

U. S. Land Office, Humboldt, Cal.

Dec. 27, 1882.

Notice is hereby given, to whom it may concern, that John C. Johnson, of Eureka, Humboldt county, Cal., has made an application to the government of the United States to purchase the following described tract of timber land under the provisions of an act for the sale of timber land in California, Oregon, Nevada, and in Washington Territory, approved June 3, 1878, to-wit:

The S. W. ¼ of sec. 15, T. 8, N. R. 1 E., H. M., containing 160 acres.

All persons holding adverse claim thereto are hereby required to present the same before the register and receiver within sixty days from the date hereof, or the entry will be perfected under the provisions of said act.

C. F. ROBERTS,

j b w iot. Registe r.

County of Humboldt. }
State of California, } ss.

Austin Wiley, being first duly sworn, deposes and says that he is one of the proprietors of the "Times-Telephone," a newspaper printed and published in the city of Eureka, in the county and State aforesaid; that the timber land notice, of which the annexed is a printed copy, was published in said newspaper for ten weeks, commencing on the 6th day of January, 1883, and ending on the 10th day of March, 1883, and as often as said paper was published during said period, not more than seven days intervening between publications.

AUSTIN WILEY.

Subscribed and sworn to before me this 10th day of March, A. D. 1883.

SOLOMON COOPER,
Receiver.

No. 5118. Receiver's Office at Humboldt, Cal.
Mch. 21st, 1883.

Received from John C. Johnson, of Humboldt county, California, the sum of four hundred (400) dollars and cents, being in full for the southwest quarter of section No. fifteen (15), in township No. eight (8), north of range No. one (1) E., H. M., containing one hundred and sixty (160) acres and —— hundredths, at $2.50 per acre.

(Rec'd R. & R. fees for entry, $10.) Act June 3d, 1878. Timber.

$400.00. SOLOMON COOPER, Receiver.

No. 5118. Receiver's Office at Humboldt, Cala.
March 21st, 1883.

It is hereby certified that in pursuance of law, John C. Johnson, residing at , in Humboldt county, State of California, on this day purchased of the register of this office the southwest quarter of section No. 5, in township No. 8, north of range No. 1, east of the Humboldt principal meridian, California, containing 160 acres, at the rate of two dollars and fifty cents per acre, amounting to four hundred dollars and —— cents, for which the said John C. Johnson has made payment in full as required by law.

Now, therefore, be it known that, on presentation of this certificate to the commissioner of the general land office, the said John C. Johnson shall be entitled to receive a patent for the lot above described.

C. F. ROBERTS, Register.

[Written across face in red ink:]

Canceled June 7, 1889. See Com. letter "P," June 7, 1889. S. S. T. Canceled.

(On reverse side is following:

(4-1869., 68.

[In red ink:] Div. C. List No.

No. 5118.

Cash Entry. Land Office at Humboldt, Cala. Sec. 15, town. 8, north, range 1 east.

[In red ink:] Timber Act. Unofficial. Canceled by order Com. letter "P," of June 7, 1889. S. C. Boom, Register.

Approved ....
By .... Clerk.
Division. ....
Patented ....
Recorded Vol..... ...., Page

March 22, '94. Entry returned to Div. "C." W. E. V.
N. E.
W. E. V.
W. E. V.
3-89 Act'g Chief of "P."

[Endorsed]: 12,015. Cal. Redwood Co. v. Mahan. Complainant's Exhibit "D." Filed Jan. 6, 1897. W. J. Costigan, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit Northern District of California.

IN EQUITY.

CALIFORNIA REDWOOD COMPANY,
Complainant,

WILLIAM MAHAN,
Respondent,

Petition for Appeal.

To the Honorable WILLIAM W. MORROW, Judge of the Circuit Court of the United States, for the Northern District of California:

Now, by its solicitors, Page, McCutchen & Eells, comes the California Redwood Company, the complainant in the above-entitled cause, and having filed with the clerk of said Circuit Court an assignment of errors, prays this Honorable Court to allow an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree of the Circuit Court in the above-entitled cause entered on the 12th day of April, 1897.

Dated San Francisco, August 3d, 1897.

CHARLES P. EELLS,
PAGE, McCUTCHEN & EELLS,
Solicitors for Complainant.

[Endorsed]: Filed August 9, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

IN EQUITY.

CALIFORNIA REDWOOD COMPANY,

Complainant,

vs.

WILLIAM MAHAN,

Respondent,

Assignment of Errors.

Now comes the California Redwood Company, complainant in the above-entitled cause, and assigns errors in the decision and decree of the Circuit Court therein, as follows:

1. The Court erred in holding that upon the facts appearing on the trial of said cause the commissioner of the general land office had power of jurisdiction to cancel complainant's certificate of purchase, without previous notice to complainant of the proceedings for cancellation.

2. The Court erred in holding that upon the facts appearing on the trial of said cause, the commissioner of

the general land office had power or jurisdiction to cancel complainant's certificate of purchase without formal charges or fraud or illegality in its issuance, and a hearing and trial of such charges upon principles of equity and justice as recognized in courts of equity.

3. The Court erred in holding that upon the facts appearing on the trial of said cause, the commissioner of the general land office had power or jurisdiction to cancel complainant's certificate of purchase without legal and competent evidence of fraud or illegality in its issuance.

4. The Court erred in holding that upon the facts appearing on the trial of said cause, the commissioner of the general land office had any power or jurisdiction to cancel complainant's certificate of purchase, except upon the approval of the secretary of the interior and attorney general, pursuant to the provisions of section 2451 of the Revised Statutes.

5. The Court erred in holding that upon the facts appearing on the trial of said cause, the commissioner of the general land office had power or jurisdiction to cancel complainant's certificate of purchase, except upon and after reporting his decision thereon to Congress, pursuant to sections 2452, 2453, and 2454 of the Revised Statutes.

6. The Court erred in holding that upon the facts appearing on the trial of said cause, the order of the commissioner of the general land office purporting to cancel complainant's certificate had any effect whatever to

create any presumption against the validity and legality of issuance of said certificate of purchase.

7. The Court erred in holding that upon the facts appearing on the trial of said cause, the complainant's certificate of purchase, that is to say, the entry by Johnson, was ever canceled by the commissioner of the general land office, or at all.

8. The Court erred in holding that upon the facts appearing on the trial of said cause, the issuance of patent to the respondent Mahan upon his entry created any presumption whatever against the validity or regularity of issuance of complainant's prior certificate of purchase.

9. The Court erred in holding that upon the facts appearing on the trial of said cause, the burden of proof was upon complainant to show affirmatively that it was entitled to a patent by evidence other than, or in addition to proof that the proceedings preliminary to the issuance of the Johnson certificate or purchase, under which it holds, were regular and in accordance with law, and that the certificate was regularly found, and that complainant was a bona fide purchaser thereof.

10. The Court erred in holding that upon the facts appearing on the trial of said cause, the proofs failed to show that Johnson's entry was valid.

11. The Court erred in holding that upon the facts appearing upon the trial of said cause, the complainant failed to show affirmatively that it was entitled to the patent issued to Mahan.

12. The Court erred in holding that upon the facts appearing on the trial of said cause, the evidence of com-

plainant's bona fide purchase was inadmissible and irrelevant.

13. The Court erred in holding that upon the facts appearing on the trial of said cause, the complainant was not entitled to the patent, and in not entering a decree in its favor, as prayed in its bill.

August 3d, 1897.

CHARLES P. EELLS,
PAGE, McCUTCHEN & EELLS,
Solicitors for Complainant.

Service of a copy of the within assignment of errors is hereby admitted this 7th day of August, 1897.

HENLEY & COSTELLO,
Attorneys for Respondent.

[Endorsed]: Filed August 9, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CALIFORNIA REDWOOD COMPANY,

Complainant,

vs.

WILLIAM MAHAN,

Respondent.

Order Allowing Appeal.

It appearing to the Court that the complainant in the above cause has filed its assignment of errors as required by the rules and its petition for allowance of appeal,

It is ordered that said appeal be allowed as prayed for; and

It is further ordered that the supersedeas bond on said appeal be fixed at the sum of one hundred dollars.

Dated San Francisco, August 9, 1897.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: Filed August 9, 1897. Southard Hoffman, Clerk. By W. B. Beaizley, Deputy Clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

CALIFORNIA REDWOOD COMPANY, Plaintiff,	}	
vs.	}	No. 12015.
WILLIAM MAHAN, Defendant.	}	

Bond on Appeal.

Know All Men by These Presents, that we, California Redwood Company, as principal, and Robert Balfour and A. H. Small, as sureties, are held and firmly bound unto William Mahan in the full and just sum of one hundred dollars, to be paid to the said William Mahan, their attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this tenth day of August, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, lately at a session of the Circuit Court of the United States, for the Northern District of California, in a suit depending in said court, between California Redwood Company, complainant, and William Mahan, respondent, judgment was rendered against the said complainant, and the said complainant having obtained from said Court an order allowing appeal to reverse the decree in the aforesaid Court, and a citation directed to

the said William Mahan and to his solicitors, Henley & Costello, is about to be issued, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California, on the eighth day of September next.

Now, the condition of the above obligation is such, that if the said California Redwood Company shall prosecute its appeal to effect, and shall answer all damages and costs that shall be awarded against them, if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CALIFORNIA REDWOOD COMPANY.

By CHAS. PAGE, President. [Seal]

R. BALFOUR. [Seal]

A. H. SMALL. [Seal]

United States of America,
Northern District of California,
City and County of San Francisco.

Robert Balfour and A. H. Small, being duly sworn, each for himself deposes and says that he is a householder in said District, and is worth the sum of one hundred dollars, exclusive of property exempt from execution, and over and above all debts and liabilities.

R. BALFOUR.

A. H. SMALL.

Subscribed and sworn to before me this 10th day of August, A. D. 1897.

[Seal] JAMES L. KING,
Notary Public in and for the City and County of San Francisco, State of California.

Form of bond and sufficiency of securities approved.

WM. W. MORROW,
Judge.

[Endorsed]: Filed August 10th, 1897. Southard Hoffman, Clerk.

In the Circuit Court of the United States, of the Ninth Judicial Circuit, Northern District of California.

CALIFORNIA REDWOOD COMPANY, Complainant,
vs.
WILLIAM MAHAN, Respondent.
} No. 12,015.

Clerk's Certificate to Transcript.

I, Southard Hoffman, clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing pages numbered from 1 to 75, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the

same together constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $53.00, and that said amount was paid by California Redwood Company, Complainant.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court this 28 day of September, A. D. 1897.

[Seal] SOUTHARD HOFFMAN,

Clerk United States Circuit Court, Northern District of California.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to William Mahan, respondent, and to Henley & Costello, his solicitors, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 8th day of September next, pursuant to an order allowing appeal, in the clerk's office of the Circuit Court of the United States, Ninth Circuit, Northern District of California, in a certain action numbered 12,015, wherein California Redwood Company is complainant in error, and you are respondents, to show cause, if any there be, why the decree rendered against

the said complainant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable WILLIAM W. MORROW, Judge of the United States Circuit Court, Ninth Circuit, Northern District of California, this tenth day of August, A. D. 1897.

WM. W. MORROW,
Judge.

Service of within citation and receipt of a copy thereof is hereby admitted this tenth day of August, 1897.

HENLEY & COSTELLO,
Attorneys for Respondent.

[Endorsed]: Filed August 10, 1897. Southard Hoffman, Clerk.m

[Endorsed]: No. 404. In the United States Circuit Court of Appeals for the Ninth Circuit. California Redwood Company, Appellant, v. William Mahan, Appellee. Transcript of Record. Upon appeal from the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

Filed October 1, 1897.

F. D. MONCKTON,
Clerk.

No. 404.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

CALIFORNIA REDWOOD COMPANY, *Appellant,*

VS.

WILLIAM MAHAN, *Appellee.*

Appellant's Points and Authorities.

PAGE, MCCUTCHEN & EELLS,
Solicitors for Appellant.

GEO. SPAULDING & CO., PRS., 414 CLAY ST., SAN FRANCISCO.

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

CALIFORNIA REDWOOD COMPANY, *Appellant.* *vs.* WILLIAM MAHAN, *Appellee.*	No. 404.

APPELLANT'S POINTS AND AUTHORITIES.

This is one of several cases which were tried conjointly, and which all involve the question of the power of the Commissioner of the General Land Office to cancel timber land entries, under the Act of June 3, 1878. The case of *California Redwood Company* vs. *Litle*, appealed to this Court at the same time, and which will be submitted with this appeal, involves the rights of a *bona fide* purchaser of a fraudulent entry. The case at bar, although it presents the same evidence of *bona fide* purchase, differs from the Litle case in the fact that no proof of fraud in the entry was made at the trial; and the especial question presented by it is whether the Commissioner of the General Land Office can cancel a timber land entry for fraud without notice to the claimant or the parties interested.

Summary of Facts.

On December 27, 1882, one John C. Johnson made and filed in the U. S. Land Office, at Humboldt, California, his sworn statement under the "Timber Land Act" of June 3, 1878 (20 Stat. at Large, p. 89), making application to purchase the southwest quarter of section 15, T. 8 N., R. 1 E., H. M., in Humboldt County, California. This statement was in due form as prescribed by the Act (Trans., folio 75). On the same day the Register issued a notice of this application, requiring all persons holding adverse claims to present them within sixty days. This notice was duly posted and published for sixty days (Trans., folios 84–86). On March 13, 1883, Johnson produced two witnesses who made and filed the statutory proofs of the character and quality of the land, the absence of adverse claims, and the good faith of Johnson's application (Trans., folios 77–80). These proceedings fulfilled all the requirements of the Act, and accordingly on March 21st, 1883, Johnson paid to the Receiver of the Land Office $400 and entry fee (Trans., folio 86), and received from the Register his final receipt and duplicate certificate of purchase (folio 87) certifying that Johnson had purchased and paid for in full the land mentioned, and was entitled to receive a patent therefor. All these documents pursuant to the statute were forthwith transmitted by the Register and Receiver to the General Land Office at Washington.

On March 23d, 1883, Johnson for an expressed consideration of $400 conveyed the land in suit to one Charles E. Beach, by deed, recorded March 24, 1883,

in the Humboldt County Recorder's office (Trans., folios 33–35). On March 26, 1883, Beach conveyed the land, with other lands, to F. P. Hooper, J. A. Hooper and Josiah Bell, by deed recorded April 30th, 1883, in the Humbold County Recorders's office (Trans., folios 35–37). On July 27, 1883, the Hoopers and Bell conveyed to the California Redwood Company a great quantity of land, including this, with mills, railroads and other property, which deed was recorded on August 2nd, 1883, in said Humboldt County Recorder's office (Trans., folios 38–44).

No patent was issued or other action taken on Johnson's entry by the Land Office until March 8, 1888, when the Commissioner wrote to the local Land Office (Trans., folio 46) that a special agent had reported to him in November, 1887, that he was convinced there was wilful fraud in Johnson's entry, and that the entryman was in collusion with other parties when making the same, "as he was a man of no means, and conveyed the land to Beach immediately after entry for less than it would cost to make such entry. Said entry is accordingly held for cancellation." The letter further instructed the local Land Officers to notify the claimant of this action, advising him that if he failed to show cause within sixty days why his entry should be sustained, the same would be finally cancelled; and that if the Land Officers *had knowledge* that the land has been transferred or mortgaged they should also notify the transferee or mortgagee. The Commissioner's letter itself mentioned the deeds from Johnson to Beach, and from Beach to Hoopers and Bell, and referred to the county records. No further examination of records was apparently made

by the Land Office and no notice whatever of the impeding cancellation was given to the California Redwood Company. Notice was sent by mail to Johnson (but not received by him) and to "C. A. Beach" and "Hooper Brothers" (Trans., folio 69), and on January 8, 1889, the Receiver wrote the Commissioner of the General Land Office informing him of that fact, and that no hearing had been applied for. On March 11, 1889, another registered notice was mailed by the Register to Johnson and not received by him (Trans., folios 72, 73), and the local Land Office so notified the Commissioner on May 15, 1889 (folio 73), whereupon the Commissioner replied (folio 74) on June 7, 1889, reciting that these letters showed that the claimant "*was duly notified,*" and that the time had expired without his taking any action in the matter, and that "said entry is accordingly this "day cancelled. You will so note on your records and "hold the land subject to entry by the first qualified ap- "plicant." The duplicate certificate in the Land Office was accordingly defaced by having written across it "Cancelled by order Com. letter 'P' of June 7, 1889, S. C. Boom, Register," (Trans., folio 87).

On September 11, 1889, William Mahan made timber entry of the same land at the Humboldt Land Office, and a patent therefor was issued to him by the Government on March 10, 1891. This action was brought on December 1st, 1894, to obtain a decree that Mahan holds the patent in trust for the California Redwood Company.

It will be noticed, first, that no notice whatever was given, either to the original entryman or his recorded transferree, of the intended cancellation of entry; second,

that no proof whatever of fraud was ever made to the Land Office. The only suspicious circumstances recited by the Commissioner were that Johnson was a poor man (!); and that he had made a deed for nominal consideration within a few days after obtaining his certificate of purchase, and more than sixty days after making his sworn statement. These circumstances were expressly declared by the Supreme Court in *U. S.* vs. *Budd*, 144 U. S., 163, to "amount to little or nothing," to be "perfectly legitimate," and to "imply or suggest no wrong." The cancellation complained of was therefore made without notice to the parties interested, without charges, without hearing, and without any evidence of fraud.

Upon this summary of facts, the appellant claims and seeks by this brief to establish the following legal propositions:

1. That by final proof and payment the entryman and his assigns acquired a vested interest in the land, of which he could only be deprived by due process of law.

2. That the action of the Commissioner in assuming to cancel this entry without notice, without formulating charges, and without legal proof, was not due process of law, was beyond the scope of his jurisdiction, and was absolutely void.

3. That such cancellation being void does not alter the burden of proof, and that the record of entry and the certificate of purchase are *prima facie* evidence of plaintiff's right to the patent.

4. That because the Johnson entry was not lawfully cancelled, the patent to Mahan is held by him in trust for the California Redwood Company.

I.

NATURE OF ENTRYMAN'S TITLE.

The holder of a paid up certificate of purchase has a perfect equitable title which may be conveyed or devised, will descend to heirs and may be devised in the same manner as any legal title. It may be taken on execution, may be taxed and sold for delinquent taxes by the State, and will support the action of ejectment except against the United States. These are well known principles, for which it is unnecessary to cite authority. The United States Supreme Court has defined the character of these titles in many cases.

In *Carroll* vs. *Safford*, 3 How. U. S., 460, the Court says: "When the land was purchased and paid for it was no longer the property of the United States, but of the purchaser. He held for it a final certificate which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States or reserved from sale, the certificate or patent might be recalled by the United States as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee. It is said the fee is not in the purchaser but in the United States until patent shall be issued. This is so technically at law, *but not in equity.*"

In *Witherspoon* vs. *Duncan*, 4 Wall., 210, the Court says: "According to the well known mode of proceeding at the Land Offices (established for the mutual convenience of buyer and seller) if the party is entitled by law to enter the land the Receiver gives him a certificate

of entry reciting the facts, by means of which in due time he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The Government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse before in the regular course of business in the General Land Office it can issue."

In *Simmons* vs. *Wagner*, 101 U. S., 260, the Court says: "It is well settled that when lands have once been sold by the United States and the purchase money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void, as long as the first sale continues in force. (*Wirth* vs. *Branson*, 98 U. S., 118; *Frisbee* vs. *Whitney*, 9 Wall., 187; *Litle* vs. *Arkansas*, 9 How., 314). Where the title to a patent has once become vested in a purchaser of Government lands, it is equivalent, so far as the Government is concerned, to a patent actually issued. The execution and delivery of the patent, after the right to it has become complete, are the mere ministerial acts of the officers charged with that duty."

In *Parsons* vs. *Venzke*, 164 U. S., 89, the Court says: "An entry is a contract. Whenever the local land officers approve the evidence of settlement and improvement and receive the cash price they issue a receiver's

receipt. Thereby a contract is entered into between the United States and the pre-emptor, and that contract is known as an entry. It may be like other contracts voidable, and is voidable if fraudulently and unlawfully made. The effect of the entry is to segregate the land entered from the public domain, and, while subject to such an entry, it cannot be appropriated to any other person, or for any other purpose. * * * *When by due proceedings in the proper tribunal* the entry is set aside and cancelled, the contract is also terminated."

It is unquestionably true that an entry like a patent is liable to be cancelled and set aside for fraud. The question to be here determined is what tribunal and upon what notice, pleading, and proofs, is competent to cancel it. Until cancelled, its holder is entitled to the same presumptions and protection as with other property. The issuance of a patent is a mere ministerial act under the foregoing decisions—a cog in the wheel of official routine. It would not be seriously contended that only after that ministerial act can the entryman claim his constitutional right to due process of law, and be put upon his defense, and that before patent issues he merely holds his property by the uncertain tenure of the whim of the chief clerk in the Land Office.

II.

THE CANCELLATION OF ENTRY WITHOUT NOTICE TO THE OWNER IS VOID.

The Commissioner of the General Land Office under no circumstances has power to cancel entries except upon notice to the parties interested, giving them an

opportunity to be heard, and his attempt to do so is void.

Orchard vs. *Alexander*, 157 U. S., 383.
Parsons vs. *Venzke*, 164 U. S., 89.
Cornelius vs. *Kessel*, 128 U. S., 456.
Johnson vs. *Towsley*, 15 Wall., 85.
Lindsey vs. *Hawes*, 2 Black., 554.
Lewis vs. *Shaw*, 57 Fed. Rep., 516; also 70 Fed. Rep., 289.
Wilson vs. *Fine*, 14 Sawy., 224.
Smith vs. *Ewing*, 11 Sawy., 56.
Stimson vs. *Clark*, 45 Fed. Rep., 760.
Jones vs. *United States*, 35 Fed. Rep., 561. (Reversed on appeal, but not on this point.)
Stimson Manfg. Co. vs. *Rawson*, 52 Fed. Rep., 426.
Montgomery vs. *U. S.*, 36 Fed. Rep., 5.
Brill vs. *Stiles*, 35 Ill., 309.
N. P. R. R. vs. *Barnes*, 51 N. W. Rep., 406.
Puget Mill Co. vs. *Brown*, 54 Fed. Rep., 98. (Affirmed on appeal, 59 Fed. Rep., 35.)
Stimson Land Co. vs. *Hollister*, 75 Fed. Rep., 941.
Caldwell vs. *Bush*, 45 Pac. Rep., 488.
Young vs. *Hanson*, 64 N. W. Rep., 654.
Delles vs. *Second Natl. Bank*, 50 Pac. Rep., 190.

In *Lindsey* vs. *Hawes*, *supra*, the Supreme Court reviews the authorities, and declares it to be the settled doctrine of the Court that a decision of the General Land Office rendered *ex parte*, without notice to parties interested, will be disregarded by the courts.

In *Cornelius* vs. *Kessel*, *supra*, an order of cancellation

of entry had been made by the Commissioner of the General Land Office, without notice to the parties interested, and the lands had been subsequently patented to another. The original entryman sued the patentee to obtain conveyance, and judgment in his favor was upheld by the Supreme Court, which said: "The power of supervision and correction (by the Commissioner of the General Land Office) is not an unlimited or an arbitrary power. It can be exercised only when the entry was made upon false testimony, or without authority of law. It can not be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other legally acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

In *Orchard* vs. *Alexander*, *supra* (p. 383), the Court says: "Of course this power of reviewing and setting aside the action of the local land officers is as was decided in *Cornelius* vs. *Kessel*, not arbitrary nor unlimited. It does not prevent judicial inquiry. (*Johnson* vs. *Towsley*, 13 Wall., 72.) A party who makes proofs which are accepted by the local land officers and pays his money for the land, has acquired an interest of which he can not be arbitrarily dispossessed. His interest is subject to State taxation. (*Carroll* vs. *Safford*, 3 How., 441; *Witherspoon* vs. *Duncan*, 4 Wall., 210). The Government holds the legal title in trust for him and he may

not be dispossessed of his legal rights without due process of law. *Due process in such case implies notice and a hearing.*"

In *Parsons* vs. *Venzke, supra*, the Court, defining the jurisdiction of the Land Department, says that it is "a jurisdiction not arbitrary nor unlimited *nor to be exercised without notice to the parties*, nor one beyond judicial review under the same conditions as other orders and rulings in the Land Department."

Section 2450 of the Revised Statutes provides: "All suspended entry cases are to be heard and determined upon principles of equity and justice as recognized by courts of equity." Do courts of equity render judgment without notice or proof?

In *Wilcox* vs. *Jackson*, 13 Peters, 511, it was held where the land officers exceed the jurisdiction conferred upon them, although not the result of any fraud or imposition, relief is nevertheless granted. "Their decisions are binding when acting within their jurisdiction, but when acting without the pale of their authority *they are to be regarded as mere nullities.*"

In deciding this case the learned Judge of the Court below merely said that it presents substantially the same questions as were raised in the case of the *California Redwood Company* vs. *Litle;* and in the opinion in the Litle case he declared that he considered himself bound upon this point of notice by the decision of this Court in the case of *American Mortgage Co.* vs. *Hopper*, 64 Fed. Rep., 553, and he based his determination of the question of the necessity of notice upon that ground solely. We think that the Judge overlooked a broad

distinction between this case and the Litle case, and also between this case and the *American Mortgage Co.* vs. *Hopper*. It is true that in the Litle case there was no proof of notice before cancellation of entry, but, on the other hand, there was proof of actual fraud in the entry itself. There is no such evidence here. In the Hopper case there was in fact a hearing and contest in the Land Department, and evidence was introduced, and the entryman, if not his assignee, was actually notified and attended the hearing. All these conditions are lacking in the case at bar. The decision in the Hopper case declares that "The conclusions of the Land Office having been arrived at *apparently within the scope of its authority* are *prima facie* correct," and that the burden of proof is upon the one attacking them. We can find no fault with that declaration of the law in a case where notice has been given. But where no notice was given to the parties interested before cancellation of the entry, how can it be said that the decision was apparently within the scope of the authority of the Land Office? The decision of no tribunal is *prima facie* valid or within the scope of its authority unless it has jurisdiction of the person as well as of the subject matter and exercises that jurisdiction in the mode prescribed by law; and if the lack of jurisdiction appears, whether on collateral attack or otherwise, the decision is not merely voidable, but void. It is elementary justice that no man's case shall be judged unheard.

It seems superfluous to argue that the course pursued by the Land Office in the case at bar did not constitute due process of law. No court or official in Christendom

is endowed with such irresponsible and tyrannical power. As was said by Judge Deady in *Wilson* vs. *Fine*, *supra*, "the fiat of an officer of the Land Department is not law; nor is this a government by pasha."

We claim, therefore, that the case at bar is distinguishable from *American Mortgage Co.* vs. *Hopper*, because in that case there was at least a hearing and proofs and notice to the claimant if not to the owner, but in ours there was no pretence even of that, and if that decision is regarded as a precedent against us, it is opposed to the later decisions of the Supreme Court in *Orchard* vs. *Alexander* and *Parsons* vs. *Venzke* and should be modified.

III.

PLAINTIFF'S UNCANCELLED ENTRY AND CERTIFICATE OF PURCHASE WERE PRIMA FACIE PROOF OF ITS RIGHT TO A PATENT.

The decision in *American Mortgage Co.* vs. *Hopper*, is further cited as a precedent against us in the opinion of the trial Court, to the effect that although the cancellation of the entry may have been void as made without notice, nevertheless in some way it deprives us of the presumption that our entry was regular, and casts on us the burden of proving as an independent fact, in addition to the certificate, that the entryman performed "all the acts required of him by the law to perfect and complete his entry." We admit that principle to be good in its application to the Litle case (in which Judge Morrow rendered his opinion), because fraud in the entry

was proved, and we tried to meet its requirements there by showing our *bona fide* purchase; and we admit its correctness in *American Mortgage Co.* vs. *Hopper*, provided that notice of the hearing in the Land Office was given in that case. But we submit that it has no application in the case at bar. The principle proceeds on the assumption that because the entryman would have no vested rights if there has been fraud in his purchase; therefore, if he is charged with fraud, his entry is not entitled to consideration unless coupled with independent proofs of all the facts recited in it, and before any evidence impeaching the entry has been given. We respectfully submit that this reasoning is fallacious and comprises a vicious circle. It assumes that the entryman was guilty of fraud and throws on him the burden of proving his innocence before it is attacked. It is said that there is a presumption in favor of the regularity of the patent, but there is an equal presumption in favor of the regularity of the prior entry and certificate of purchase. One presumption should be set off against the other, and first in time is first in right. There is no *greater* presumption in favor of the patent than in favor of the certificate. If the attempted cancellation by the Land Department was void, as we have shown, it follows as a necessary result that it must be disregarded for every purpose; that it took away no rights and conferred none; that it does not affect our certificate of purchase, and that we may claim all the legal presumptions created by that certificate, which recites that we are entitled to a patent. The certificate is regular upon its face, and was issued after

"satisfactory proof" had been given to the Register and Receiver, and upon an affidavit of the entryman showing all the facts required by the statute. It is true that it would be void if that affidavit was false, but its falsity is a matter of defense. Our entry being regular in form and prior in time confers a right superior to respondent's patent, unless he can successfully impeach it for perjury or for some other sufficient reason, but it lies with him to show cause. He has accepted the patent *cum onere.*

We find nothing in the cases cited as authority in *American Mortgage Co.* vs. *Hopper* to support the proposition that the burden of proof of innocence is shifted to the plaintiff, where the cancellation of entry by the Land Department is void. The cases of *Lee* vs. *Johnson* and *Bohall* vs. *Dilla*, and *Puget Mill Co.* vs. *Brown*, merely show that affirmative evidence was given, presumably by the patentees, tending to prove that the contesting entrymen were not in fact entitled to make the entries relied on. Upon those facts the Court used the words quoted in the Hopper decision: "He must in all cases show that but for the error of fraud or imposition of which he complains he would be entitled to the patent; it is not enough to show that it should not have been issued to the patentee." It is nowhere held in those decisions that the certificate of entry is not competent and sufficient evidence of the entryman's right to a patent. They merely declare that it is not *conclusive* evidence. On the other hand, in *Cornelius* vs. *Kessel, supra*, where the certificate of entry had been unlawfully cancelled in the Land Office and patent issued to another, the Supreme Court expressly declares: "The interest of Davidson in the

tract, which embraces the premises in controversy, acquired by him by his entry, was not lost or *impaired* by the order directing its cancellation. That order was illegally made, and those claiming under him *can stand upon the original entry*, and are not obliged to invoke the subsequent reinstatement of the entry by the Commissioner. As that entry, with the payment of the purchase money, gave Davidson a right to a patent from the United States, his heirs are entitled to a conveyance of the legal title from those holding under the patent wrongfully issued to Puffer."

U. S. vs. *Steenerson*, 50 Fed. Red., 504, which is cited in the decision of *American Mortgage Co.* vs. *Hopper*, also seems to us to be an authority against the conclusion of the Court on the question of burden of proof. That was an action of replevin by the Government for logs cut upon land which had been entered by one Hanson, who had obtained a certificate of purchase, and had transferred his claim of title to the defendant. The Commissioner of the General Land Office attempted to cancel the certificate, on the ground of fraud in the entry, and the Court, oddly enough, declared that it could not be successfully maintained that the Commissioner had not the power to annul the entry for fraud, and at the same time says that the action of the Commissioner, being *ex parte*, was not conclusive, but can be collaterally attacked. It seems to us that this is nothing more than saying that if the Commissioner was right in thinking that it was fraudulent, the entry was void; but if he was wrong, it was not. The decision certainly attaches no weight to his ruling in any way, for the case proceeded precisely as if

it had never been made. The Government proved that the land had once been part of the public domain, and that the logs had been cut from it. The defendant then offered his certificate of entry without further proof; and the Government then undertook to prove, not the cancellation, but the original fraud *de novo*, assuming the burden of proof. The Court says (p. 508): "When evidence of this kind is offered by the claimant" (*i. e.* evidence of entry by introduction of the certificate of purchase, for that was in fact the only evidence there offered by the claimant) "it is open to the United States to meet it by proof of any fact or facts which, if established, will show that the claimant has not become the real owner of the realty," etc. These words are quoted in the Hopper decision as authority for holding that the certificate must be accompanied by other proofs before it is attacked; but we are confident that so far from supporting that view the Steenerson decision is in fact an authority in our favor. In the final paragraph of that decision the Court says: "The evidence which the United States sought to "introduce tended to prove that Hanson entered the "land, not for settlement and improvement by him for "his own benefit, but for the express benefit of the log-"ging company, and under an agreement with them. " * * * Such facts, *if proven*, would certainly "show that Hanson never acquired a valid title, legal or "equitable, to the land as against the United States, and "as the defendants, in support of their right to the logs "cut from the land, put in evidence the entry and de-"claratory statement made by Hanson, it was *open to the* "*United States to prove* that such entry was in violation

" of the statute, *and the statement was false, and therefore* " no rights were acquired thereunder by Hanson or his " grantees, who aided in the perpetration of the fraud " thus established. We hold, therefore, that it was error " to rule out the evidence offered by the United States." Under the construction given to the Steenerson case in *American Mortgage Co.* vs. *Hopper*, this order of proof is reversed, and the entryman is required to disprove fraud before the Government proves anything.

We respectfully urge that the doctrine that the entryman in addition to his certificate must prove *de novo*, and independently by other evidence, all the facts in the certificate recited, as part of his case in chief, and in advance of any evidence impeaching it, can not be justified in principle, is not supported by authority, and is directly opposed to the decision of the Supreme Court in *Cornelius* vs. *Kessel.*

IV.

THE RESPONDENT HOLDS THE PATENT IN TRUST.

The Land Office has no power to patent to one person land which has been previously sold to another, unless the prior sale has been legally cancelled and vacated, and if it shall attempt to do so, the patentee will be adjudged to hold the title in trust for the holder of the prior certificate.

Simmons vs. *Wagner*, 101 U. S., 260.
Sherman vs. *Buick*, 93 U. S., 209.
Wirth vs. *Branson*, 98 Cal., 118.

Frisbie vs. *Whitney*, 9 Wall., 187.
Lytle vs. *Arkansas*, 9 How., 314.
Patterson vs. *Tatum*, 3 Saw., 164.

Many other authorities may be cited to the same point, but we do not understand that any doubt exists as to the proposition.

Summary.

In conclusion, we claim that the proof of our prior entry and certificate of purchase, being regular upon its face, and our deraignment of title from the entryman, made out a *prima facie* case against the patentee; that to defeat it, he must establish either a valid cancellation of our entry by the Land Office, or that such fraud or irregularity existed as would warrant its cancellation; that he has failed to do so; that a decree should have been given to plaintiff as prayed for, and that the judgment in favor of defendant should be reversed.

Respectfully submitted,

PAGE, McCUTCHEN & EELLS,

Solicitors for Appellant.

No. 404

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

CALIFORNIA REDWOOD COMPANY,

Appellant,

vs.

WILLIAM MAHAN,

Appellee.

Respondent's Points and Authorities.

BARCLAY HENLEY,
S. V. COSTELLO,
Solicitors for Respondent.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

CALIFORNIA REDWOOD COMPANY,
Appellant,

vs.

WILLIAM MAHAN,
Appellee.

RESPONDENT'S POINTS AND AUTHORITIES.

STATEMENT OF CASE.

On pages 2, 3, 4 and 5 of appellant's brief is to be found what purports to be a summary of the facts of this case. That statement is rather a summary of what is alleged in the Bill than what was proved at the trial. That is to say, the theory of the plaintiff here is that to establish the various allegations of the Bill it was only necessary at the trial to introduce the *record* of what was proved in

the Land Office. The Court will understand that this is an action by the grantee of the holder of a certificate of purchaser charging the defendant with being a trustee and holding the title to the land for the plaintiff. The main point of controversy, it may be stated at the outset, between plaintiff and defendant, is this:

The plaintiff contends that in this action to make out his case all he has to do is to introduce the record evidence of what took place in the Land Department, including the testimony given there by the witnesses who testified in behalf of the original entrymen, who subsequently assigned his certificate of purchase to other parties through whom the plaintiff deraigns title. Upon an offer of introduction of evidence as to what the witnesses testified to before the Register and Receiver, the objection was made by the defense that such evidence was incompetent, and that it was incumbent on the plaintiff to produce the witnesses and to make the same proof in respect to the character of the land and the various other necessary proofs which would have been required under the law by the Land Department of the Government.

The proof was received subject to our objection and exception, and the upshot of the matter was that the Court, taking the case under advisement, finally rendered its decision sustaining the view taken by the defense, and holding that the plaintiff has not made out its case, and that the defense was entitled to judgment.

On page 3/ of this brief will be found the various allegations of the complaint which stand unsupported by proof, by reason of which the judgment was pronounced in favor of the defense. It will

therefore be seen that a great many of the statements commencing on page 2 in appellant's brief under the head of "Summary of Facts" cannot be received as being wholly true, unless the Court holds that the determination of the lower court as to what really constitutes legal proof be reversed.

There are a number of propositions, which I shall submit on behalf of the defense, any one of which is fatal to the cause of the plaintiff in these actions; but the question which has been most discussed, we will deal with first—that question is—

I.

What is the extent of the authority of the land department in reference to the cancellation of a certificate of purchase?

The case of *United States* vs. *Steenerson*, 50 Fed., 507, presents features sufficiently similar to these to make it an authoritative exposition of law as to what is the legal status of the final certificate under which the plaintiff in these actions by mense conveyances claims.

Speaking for the Bench in that case, Circuit Judge Shiras, now on the Supreme Bench of the United States, said, "The final certificate by the Government, acknowledging the payment in full is not in terms or in legal effect a conveyance of the lands, it is merely evidence on behalf of the parties receiving it, in a controversy, involving the title of the land wherein the person claims adversely to the United States, such claimant, notwithstanding the fact that the legal title remains in the United States may prove that by performance on his part, of the requisite acts he has become the equitable owner of the lands and that the United States holds the legal

title in trust for him. But as the claimant in such case has not received a patent or formal conveyance of the lands and has not become possessed of the title *he is required to show performance on his part*, of the acts which when done, entitle him under the law to claim a title to the land.

"When evidence of this kind is offered by the plaintiff, it is open to the United States to meet it by proof of any fact or facts, which if established, will show that the claimant has not become the real owner of the realty. And if it be true in a given case that the entry to the land was not made in good faith, but in fraud of the law, it certainly can not be said that the claimant has become the equitable owner of the land and that the United States is merely a trustee."

Further on in that decision, on pages 509–510 it is said "that as the action of the Commissioner is ex-parte, it is not conclusive, and it is still open to the claimant or his grantors, to establish a right to the land by proving a valid entry on his part, *or the performance by him of the acts required* to complete a preemption entry."

The case of the American Mortgage Company vs. Hopper et als., 64 Fed. Rep., 553, is absolutely conclusive as to the plaintiff's right to recover in this action if it is to be held as law.

We conceive that the Court will have no difficulty in reaching the conclusion that it is law, because it stands unreversed and is sustained by such reasoning and such an array of authorities that make it apparently unassailable; furthermore, it overrules the two cases cited by the plaintiff and relied upon by them: Smith vs. Ewing, 23 Fed., 741, and Wilson vs. Fine, 40 Fed., 52. Both of the cases

last cited were decided by the late Judge Deady, of Oregon.

It was sought in the American Mortgage case to invoke the doctrine of *stare decisis* in favor of plaintiffs by citing the two cases above cited, but the Court of Appeals rejected the attempt and overruled the doctrine of the two cases, as the Court will see upon the perusal of the opinion,

I do not propose to burden this brief with any very copious quotations from the decision, which is most painstaking and elaborate, but will give the Court the syllabi, which seems to have been prepared by a painstaking reporter and corresponds exactly with the body of the opinion.

The second paragraph of the syllabus is as follows: "The issuance to a pre-emptor of a final receipt or certificate of payment by the receiver of a public land office does not deprive the land office of control over, or the United States of the title to the land, and such department may cancel the entry at any time before a patent is issued when it is convinced that the entry was fraudulently made, but subject to the right of the pre-emptor to have the action of the department reviewed by the Court."

I have contended all the time in this case that in this kind of proceeding, when a Government patent is assailed, that the burden of proof rests upon the plaintiff, as in other cases, to prove every material allegation of the complaint denied by the answer; and that such proof must be made in Court the same as it was made in the Land Office.

Syllabus 3 of the American Mortgage case is as follows:

"When the Land Department cancels an entry

by a preemptor after the issuance to him of a final receipt on the ground that the entry was fraudulent and issues a patent to another, the burden is on such preemptor or those claiming under him in an action to recover the land, to show that the department erred in adjudging the title to the defendant and that the plaintiff was entitled to a patent under proof that the entry was valid as against the Government."

The fourth syllabus reads:

"A preemptor who makes his payment and receives his final certificate acquires no vested right in the land where his entry and certificate are procured by fraud."

We commend this case to the careful perusal of the Court, and also the same case as it was originally tried and reported in 56 Fed., 67.

The opinion of Judge Bellinger in the case in the lower court is one that is evidently the result of elaborate research. That case is one that, as reported in the lower court and the Court of Appelas, presents sôme very strong features in favor of the plaintiff, which the plaintiffs in this case are wholly destitute of.

In the American Mortgage case, the facts were that Waddel entered the land in dispute and paid for it, and afterwards, having received his certificate, he mortgaged it to the plaintiff corporation, and the latter brought foreclosure and obtained a sheriff's deed—on this state of facts, and after giving the sheriff's deed, the defendant Hopper having homesteaded the land and initiated a contest, and upon a hearing, it having been proven that the entry was made by Waddel for the benefit of another person, the defendant Hopper prevailed, and in due time a patent was issued to him.

The action then was on the part of the Mortgage Company against Hopper as trustee, and notwithstanding the fact *that there was no notice to either Waddel or his grantors* the Mortgage Company, when the testimony was taken, upon which the cancellation was made, the holding was in favor of Hopper, the defendant; this would seem to be violative at first glance of one of the fundamental principles of law, viz., "that no man shall be deprived of his estate without having his day in court," and speaking of that the Court say: "The Commissioner of a general land office had the power to supervise the action of the Register and Receiver and to annul the entry made by Waddel if in his judgment the proofs showed that such entry was fraudulently made and was attempted to be sustained by false testimony. But such action of the Commissioner is not conclusive, and Waddel or his grantee would still be entitled to establish his right to the land in question in any court of competent jurisdiction by proving that his entry was legal and valid and that he had *fully performed all the acts required of him by the law, to perfect and complete his pre-emption entry.* The finding of the Commissioner of the General Land Office that the entry was made for the benefit of another *was without notice to Waddel or appellant*—appellant was entitled to have its duty in court. *This it had in the present suit.* The opportunity was afforded it to prove, if it could, that the entry made by Waddel was in all respects valid. It made no attempt to show that this entry was not fraudulent. *It rested its case upon the fact that it was regularly made by a qualified pre-emptor*; that the land was paid for and the receipt of the register and receiver of the local land

office given therefor—and upon these facts contended and still insists that the Commissioner had no power to cancel the entry on the ground that it was fraudulently made.

"The appellees relied upon the patent from the Government of the United States. The suit is brought to obtain a decree declaring that appellant is entitled to the patent which was issued to appellee Hopper. To entitle it to this relief it was essential for it to show that, if the law had been properly administered, the title would have been awarded to it. The suit cannot be maintained simply upon a showing that the Land Department erred in adjudging the title to the patentee. These principles are well settled both in this court and in the Supreme Court of the United States."

Citing:

Mill Co. vs. *Brown*, 59 Fed., 35.
Bohall vs. *Dilla*, 114 U. S., 47.
Lee vs. *Johnson*, 116 U. S., 48.

Further on the Court say: "In the present case there is not pretense that any fraud, deception or imposition was practiced upon the officers of the land office in obtaining the patent issued to the defendant Hopper."

Nor is there any pretense that any fraud or imposition was practiced upon the Government by the patentees who are here sued.

Further on the Court say, "There was no proof offered tending to show that Waddel's entry was valid or was made in good faith."

NOR IS THERE ANY PROOF HERE OFFERED THAT THE ENTRIES OF THE ENTRYMEN TO WHOM THE CERTIFICATES OF PURCHASE WERE ISSUED, WERE IN GOOD FAITH.

"The stipulated facts show that his original entry was cancelled by the commissioner of the general land office for the reason that it was made upon false testimony and was not for his own benefit but for the benefit of other persons."

The allegations of the complaint here (Tr., page 4) are that the commissioner cancelled the certificates upon the ground that the entries had been made by and for the benefit of another person.

Resuming the Court say, "The burden of proof was upon the appellant to show that it was entitled to a patent, and it was essential for it to prove that Waddel's entry was valid as against the Government of the United States. The conclusions of the land department upon the invalidity of Waddel's entry having been arrived at apparently within the scope of its authority, *are prima facie correct* and appellant having assailed its correctness, *it devolved upon it to* AFFIRMATIVELY SHOW THAT THE CONCLUSIONS WERE ILLEGAL AND UNAUTHORIZED. It cannot fairly be said that Waddel had acquired any vested right to the property."

From the foregoing, which is sustained by abundant authorities, it will be seen that the keenest ingenuity could not discover any distinction in principle between the American Mortgage Co. case and the one at bar.

In that case they rested upon the record; they contended when they had shown the due application for the entry, the hearing, the payment, the issuance of the certificate that they had then made out their case, but the Court held, as we ask this

Court to hold, that the burden of proof is upon the plaintiff to show:—

1. That upon the testimony adduced before the register and receiver, they are rightfully entitled to a certificate; this they must show by original testimony in the trial of the action.

2. That they must not stop there but go farther and prove that the patentees in these cases were guilty of fraud in the proofs made by them under which they obtained their titles.

In other words, in the language above quoted, when a patent is sought to be annulled, they have got to show all the facts that they were called upon to show before the land office and they must impeach the good faith of the parties.

Burling vs. *Thompson*, 77 Cal., p. 257.

PLAINTIFF IN THIS ACTION NOT ENTITLED TO PROTECTION AS A BONA FIDE PURCHASER.

It is urged with some degree of apparent earnestness that the plaintiff here is entitled to protection as a *bona fide* purchaser.

The cases from which I have been quoting leave that question no longer open to discussion. On page 560 of American Mortgage case 64, Fed. Rep., there are a great many authorities cited to the effect that a person taking a certificate of purchase is not entitled to the protection claimed.

The language of the Court is as follows:—

"When appellant purchased the land, he took it subject to the final action of the land department, and to such proceedings as might thereafter be had in the Court to affirm or set aside the rulings of the officers of the land department in regard thereto. It purchased the land before the issuance of a pat-

ent * * * * It therefore obtained by its purchase only an equitable interest in the land and is not, for the reason stated, entitled to protection as a *bona fide* purchaser."

Citing the following cases:—

Shiras vs. *Caig*, 7 Cranch, 34.
Vattier vs. *Hinde*, 7 Pet., 252.
Boone vs. *Chiles*, 10 Pet., 177.
Smith vs. *Custer*, 8 Dec. Dep. Int., 269.
Root vs. *Shields*, Woolw., 341.
Fed. Cases, No. 12038.
Randall vs. *Ederty*, 7 Minn., 450.
Shoufe vs. *Griffiths*, Wash., 30, Pac., 93.

Taylor vs Heton 77 Cal. 534

THIS PLAINTIFF, AS GRANTOR OF THE ENTRYMAN, HAS NO STATUS HERE AS A LITIGANT, THERE HAVING BEEN NO APPEAL FROM THE ORDER CANCELLING THE ENTRY.

In support of this proposition we cite the case of Buckley vs. Howe, 86 Cal., 596. The fourth syllabus of that case is as follows:

"Where the application for a homestead entry, under which the plaintiff claims was rejected and no appeal was prosecuted from the order of the register and receiver and no further steps were taken to secure its approval or to contest the issuance of the patent to the defendant, who proved up and paid for the land as a pre-emption claimant, the plaintiff possesses no right by virtue of his homestead entry to control the patent or to enforce a trust therein."

The next syllabus reads:

"Neither naked possession of the public domain nor a rejected application for leave to enter it

under whatever law it may be made, if the rejection is acquiesced in and not appealed from, will *give any such right or title as will enable the claimant successfully to attack or control a patent issued by the Government to another claimant.*" (Italics ours.) From which it would appear that it is incumbent upon the defeated contestant in the Land Department to pursue his remedy as far as he can in that department by appeal, and not having done so he loses all right to control the patent or to enforce a trust therein.

Further on, on page 601, discussing the law regarding cases in which the plaintiff may have the right to charge the defendant as holding the title to the real estate in trust, it is said: "In such a case it is not enough to show that the defendant was not entitled to have received the patent—plaintiff must also show that she herself occupies such a status toward the property as entitles her to control the legal title."

In the case of Plummer vs. Brown, 70 Cal., 546, quoting from the opinion, it is said: "To entitle the alleged owner, however, to such equitable relief he must show that he occupies such a status as entitles him to control the legal title; that the officers who awarded the land to another, to whom the title was issued pursuant to the judgment, were imposed upon and deceived by the fraudulent practices of him in whose favor the judgment was given; and that they were thereby induced to give the judgment in his favor. These things must be *distinctly alleged* and *clearly proven.*"

In this case a consultation of the allegations of the bill, page 4 thereof, will show how far short hey fall of the requirements of ordinary pleadin gs

and the rules laid down in the case last above cited. The complaint says: "That on the 21st day of January, 1896, the Commissioner of the General Land Office made an order cancelling the entry and then ensues the following allegation, which is the only one in the complaint which in any way tends to impeach or challenge the validity or rightfulness of the action of the Land Department in cancelling the said entry. The allegation is as follows:

"That said order (of cancellation) was so made and entered by the Commissioner of the General Land Office without any prior notice to your orator and without any trial or hearing and without any legal or competent evidence."

It will be noticed that *the facts* are not alleged as to what took place before the Land Office, but as a mere conclusion it is averred that the hearing was "without legal or competent evidence," without any showing or pretense *whatever as to what the evidence was.*

Resuming our notice of the case last above cited, we desire to call the attention of the Court to certain other quotations from the opinion: p. 546.

"The complaint under consideration there contains no sufficient allegations of such issuable facts; and it does show affirmatively that the plaintiff was not entitled to the relief which he demands. For it appears that in the contest as to the right to purchase the land which was the subject of the controversy, there were three issues presented."

The Court goes on to state what issues were presented and the findings of the Register and Receiver upon these issues. Resuming, p. 547 :

"But it is contended that the judgment is not couclusive against the plaintiff, because it was

rendered upon 'false and perjured testimony' and 'incompetent and immaterial evidence' of Brown, 'which the Register admitted, 'notwithstanding Brown repeatedly refused to submit to cross-examination,' and 'was prevailed upon by Brown and his attorneys to give it weight and credence, notwithstanding it was shown by the record to be false and perjured,' and 'notwithstanding it was clearly inadmissible under all rules of law and of courts and clearly incompetent and irrelevant,' and thereby 'said officers were misled and deceived, and their judgment biased by said defendant and his attorneys; and in consequence thereof said land officers * * * * contrary to the law, and contrary to the undisputed facts, thereupon ruled and decided erroneously, falsely, illegally and inequitably that the said Brown was entitled to said land, and awarded the same to him." "In these allegations there is nothing of an issuable character *as to what evidence was false or perjured, incompetent and irrelevant, upon which a court could judicially determine whether as evidence it was improperly admitted or illegally considered*; nor is there in them anything which shows what was the evidence upon which the decision was made, or that it was evidence which did not justify the decision, or showed that the decision was contrary to law. The allegations are of a general nature." (Italics ours.)

Thus it will be seen that this Court is asked in violation of the foregoing principles to hold that the order cancelling the certificate was illegal and invalid upon the bare allegations unsustained by proof that it was made without any "legal or competent evidence." We take it that such a proposition is undeserving of any further notice.

Again in the case of Sacramento Savings Bank vs. Hynes, 50 Cal., 196. the doctrine is stated, as follows, quoting from the syllabus:—

"If a Register and Receiver of a land office refused to hear the evidence of a pre-emption claimant, and allowed another pre-emption claimant to the land, to introduce his testimony and enter the same the remedy of the first party is by appeal to the Commissioner of the General Land Office. *He cannot obtain relief in equity.*" (Our italics.)

On page four of plaintiff's bill, p. 7, Trans., it is alleged that the order cancelling the entry was made upon the "pretended ground" that the entry had been procured to be made by one Charles E. Beach, etc. This apparently challenges the sufficiency of the evidence introduced before the Register and Receiver in support of the proposition that the entry was not made *bona fide* for the entryman; then follows the allegation above referred to, to the effect that the evidence was "not legal or competent"—all of which goes to show that the scheme of the bill apparently is that this Court is asked to declare the defendant a trustee of the patent, upon the ground that the evidence introduced was "insufficient" and was "illegal and incompetent"—*and this without setting forth the evidence or affording to this Court a hint as to its character.*

In the case of *Gale* vs. *Best*, 78 Cal., 235, we are sharply advised as to the fate of such attempts as these.

That was an action for the possession of land by a defeated contestant in the land office against a successfal one. The question of fact that was presented before the Register and Receiver, was as to the character of the land, whether agricultural or

mineral. The Register and Receiver held that it was of a certain character and it was sought in the action to reopen that question. The Court held that it was within the exclusive jurisdiction of the land department to decide that question of fact and that it was not subject to inquiry in the action.

Quoting from *Steel* vs. *Smelting Co.*, 106 U. S., 447, as follows:

"We have so often had occasion to speak of the land department, the object of its creation and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise, to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on that subject.

"That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the different requirements of the acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class that is open to sale." Does not this case afford cause for another "unpleasant surprise?"

The proposition advanced is that as to the question of fact that necessarily arises in the entry of a portion of the public domain, the decision of the land department is final and conclusive.

Resuming, the Court says, in *Gake* vs. *Best*, *supra*: "If intruders upon them could compel him (the patentee) in every suit for possession, to establish the validity of the action of the Land Department,

and the correctness of its rulings upon matters submitted to it, the patent, instead of being a means of peace and security would subject his rights to constant and ruinous litigation."

There are other portions of this decision which are highly instructive, to the consideration of which we commend the Court.

It is claimed by appellant that under no circumstances has the Commissioner of the General Land Office the power to cancel an entry, except upon notice to the parties interested; to that a number of cases are cited, among them, *Wilson* vs. *Fine*. 14 Sawyer, 224, and *Smith* vs. *Ewing*, 56 Sawyer, 56, which we have shown have been overruled—these being the two cases by Judge Deady which have heretofore been made the subject of comment. None of the cases, we insist, will be found to sustain the contention. But if notice were necessary, to the valid cancellation of an entry, where, we ask, is the proof in this case that such notice was not given?

Notice to plaintiff is not necessary, but the record fails to show a want of it.

We have already shown that the burden of proof is upon the plaintiff. They allege on page four of their bill that the order cancelling the entry was made without prior notice or without any trial or hearing and "without any legal or competent evidence." Where, we ask, is the proof to sustain these allegations? They are alleged as being material to sustain plaintiff's action. If they had not been material they would not have been alleged. Being alleged, why should they not be proved?

Where, we ask, is the proof in this case of the want of notice? The presumptions are all in favor

of the regularity of the action of the Register and Receiver, a presumption that attends upon all the acts of public officers, that everything that was necessary to be done to sustain the validity of their official acts was done.

In the case of *Darcy* vs. *McCarthy* 35 Kan., 722; 12 Pac., 104, the second syllabus is as follows:

"The Commissioner of the General Land Office has supervisory control over the subordinate officers in the land department, and can revise and correct their decisions; and where an erroneous entry made by the Register and Receiver was cancelled by the commissioner it will be presumed, *in the absence of evidence to the contrary*, that it was done in accordance with the rules governing such action and upon sufficient evidence."

In the case of *Jones* vs. *Meyer*, 26 Pac., Rep. 215, the doctrine is again laid down that a purchaser of a certificate of purchase is not, within the meaning of the law, an innocent purchaser. This is a very interesting decision, and we quote as follows from page 218 :

"The power of supervision given to the secretary and commissioner is a general one, over all the acts of the Register and Receiver. There is no exception made in the matter of issuing final certificates, and if the position here contended for be the correct one, to wit., that the commissioner must issue a patent at once upon the presentation of the certificate and that issue of the certificate would conclude all inquiry into matters settled by its issue, then it would conclude all supervision of the superior officers; and on that reasoning the patent might as well issue by the local as by the supervisory officers. I am led to adopt the contrary of

this reasoning. Besides, any other view would lead to hopeless conflict between the department and the courts. Our calendars would be crowded with land contests, and the action of the department would be indefinitely postponed.

"The only true doctrine in my opinion is that announced by the Supreme Court—that the jurisdiction of the Court commences when that of the department ceases; and that until the patent issues and while the matter is still pending before the department, the question is not one of private right, upon which the courts have power to act.

"We are of the opinion that if a pre-emptor has not complied with the law and procures a final certificate through fraud or perjury, a purchaser from him gets no better title than such pre-emptor obtained, and if such fraud or failure to comply with the law is established to the satisfaction of the land department, under its rules and regulations, before patent has been issued, the land department has the authority to cancel such certificate."

In the case of *Swigart* vs. *Walker*, 30 Pac. Rep., 162, we have the doctrine reiterated. Quoting from the decision, page 162, we have the following:

"The only question represented is as to the power of the United States Land Commissioner to set aside the entry, and to cancel the final receipt which has been issued. We have no doubt of the power of the commissioner. It is not claimed to have been exercised erroneously or fraudulently, and if he is warranted in taking such action in any case, it will be presumed to have been regularly and legally done in this case. The action of the local land officer is final, but is subject to the

supervision and control of the commissioner and his superior officer, the Secretary of the Interior. Until the patent issues, the commissioner, under the direction of the Secretary, is vested with full power to review and correct any error in the preceding steps taken in the disposition of the land, and may inquire into and arrest any act of fraud committed against the Government. Their power does not end with the issue of a final receipt.

"This was practically decided in the case of *Darcy* vs. *McCarthy*, 35 Kan., 722; 12 Pac. Rep., 104, *supra*, and most of the adjudicated cases on the question sustain that view.

Pierce vs. *France* (Wash. st.), 26 Pac. Rep., 192.
Jones vs. *Meyers*, (Idaho), 26 Pac. Rep., 215.
Hestres vs. *Brennan*, 50 Cal., 211.
Judd vs. *Randall* (Minn.), 29 N. W. Rep., 589.
Forbes vs. *Driscoll*, 31 N. W. Rep., 633.
Vantongeren vs. *Heffereman* (Dak.), 38 N. W., Rep., 52.
Barnards' Heirs vs. *Ashleys' Heirs*, 18 How., 45.
Bell vs. *Hearne*, 19 How., 252.
Harkness vs. *Underhill*, 1 Black, 316.
Marquez vs. *Frisbie*, 101 U. S., 473.
U. S. vs. *Schurz*, 102 U. S. 378.
Steel vs. *Smelting Co.*, 106 U. S., 447; 1 Sup. Ct Rep, 389.
Randall vs. *Edert*, 7 Minn. 450.
Gray vs. *Stockton*, 8 Minn., 529 (Gil. 472).
Ferry vs. *Street* (Utah) 11 Pac, Rep., 571.

"When Swigart purchased the land he was aware that no patent had been issued, and took it subject to a re-examination and to the right of the department to cancel the entry for sufficient reason. *No*

appeal has been taken from the order of cancellation, and having been made with authority, Swigart had no title to the property, and hence the judgment of the District Court must be affimed."

The above case was decided in the Supreme Court of Kansas.

Again in *Fernald* vs. *Winch*, 31 Pac. Rep., 665, the doctrine is re-affirmed. We quote from the syllabus:—

"The commissioner of the general land office of the United States has authority to cancel a final pre-emption receipt, and set aside the entry, before patent issues thereon; and a mortgagee of the entry man, after final receipt is given, and before the issuance of the patent takes his mortgage subject to this supervisory power of the commissioner and of tne Secretary of the Interior."

The case of *Swigart* vs. *Walker*, above citen, followed.

In the case of *Sparks* vs. *Pierce*, 115 U. S., 408, this point is again announced; this case is also reported in Book 29 of the U. Supreme Court Reports, L. C. P. Co.; opinion by Justice Field. We quote as follows—

"To entitle a party to relief against a patent of the government, he must show a better right to the land than the patentee, such as in law should have been respected by the officers of the land department and being respected would have given him the patent. It is not sufficient to show that the patentee ought not to have received the patent. It must affirmatively appear that the claimant was entitled to it, and that in consequence of erroneous rulings

of those officers on the facts existing, it was denied to him."

Citing—

Bohal vs. *Dilla*, 114 U. S., 51.

Applying the above principle to this case, how, we ask, has it been shown in this case that the plaintiff had a better right to the land than the defendant? How is it shown by the plaintiff here that it had such a right as would have been respected by the officers of the Land Department, and being so respected it should have given him the patent?

The only answer to that the plaintiff can give to this question is, "We got our certificate of purchase, and therefore that gave us the right to the patent." But the department had decided, as alleged in the complaint, that the certificate of purchase was obtained by the entryman for the benefit of another person, and therefore was fraudulent and void.

Under the decisions heretofore cited, how has it been shown that the plaintiff or the entryman had a better right to the patent than the patentee? As to whether he had or not was a question of *fact* determined by the Register and Receiver upon the testimony adduced; but as to what that testimony was there is no evidence here by which the Court can determine whether it was "relevant or incompetent," and as to the question of fact, viz., as to whether the entry was made for the benefit of another person, that question is foreclosed by the decision of the Register and Receiver and cannot be adjudicated here—and is not sought to be. As to what the evidence was, as above stated, we are completely in the dark—in fact, it is not within the

scheme of this bill that the character of that evidence should be subjected to criticism and scrutiny here. The fact is that the plaintiff relies upon THE RECORD OF THE CASE, and that is all that we have.

Again, in the case of *U. S.* vs. *Marshal Mining Co.*, 129 U. S., 579 L. Fed., 32,734, we quote from the syllabus as follows: (Opinion by Justice Field.)

3. "If the officers of the land department have acted within the general scope of their power and without fraud, the patent which has been issued must remain a valid instrument and the Court will not interfere unless there is such a gross mistake or violation of the law which confers their authority—as to demand a cancellation of the instrument.

4. Errors and irregularities in entering and procuring title to the public lands ought to be corrected within the land department so long as there are means of revising the proceedings and correcting such errors.

5. A bill in Chancery brought by the United States to set aside and vacate a patent issued under its authority is not to be treated as a writ of error or as a petition for a re-hearing in Chancery or as a retrial of the case with additional proof."

Further on in this decision, we have the following:—

"The dignity and character of a patent from the United States is such that the holder of it cannot be called upon to prove that everything has been done that is usual in the proceedings had in the Land Department before its issuance nor can he be called upon to explain every irregularity or even impropriety in the process by which the patent was procured.

"Especially is it true where the United States

On page 14 of the plaintiff's brief there are a number of authorities cited to the effect that the Government had no power to patent land which had previously been sold to another, unless the first sale has been legally and properly cancelled; to that we yield our hearty consent; but in in the present case there has been a valid prior cancellation of the sale or entry.

SOME ADDITIONAL AUTHORITIES ON THE FIRST PROPOSITION.

At the hazard of being desultory, I desire to submit some few additional authorities on a proposition heretofore discussed.

The case of *Bohall* vs. *Dilla*, 114 U. S., reported also in Book 29, L. E. page 61, reads as follows:

"To charge the holder of a legal title to land under a patent of the United States as the trustee of another, and to compel him to transfer the title, the claimant must present such a case as will show that he himself was entitled to the patent from the Government, and that in consequence of erroneous rulings of the officers of the land department upon the law applicable to the facts found, it was refused to him.

"It is not sufficient that there may have been error in adjudging the title to the patentee; it must appear that by the law properly administered the title should have been awarded to the claimant."

Smelting Co. vs. *Kemp*, 104 U. S., 636–47.

Thus again we have it from the highest Court in the land that in order to prevail against a patentee the party asking the relief must show, by evidence,

that to him should the patent rightfully have been issued.

The opinion in the latter case was by Justice Field; and the case it seems originated in Humboldt County.

Again in the case of *Hosmer* vs. *Wallace*, 47 Cal., 461, which was reaffirmed in 97 U. S., 575, L. Ed., 24:1130, the doctrine is announced, "that the decision of the land department in a case of contest upon questions of fact is conclusive." The syllabus of this case carefully summarizes the substance of the decision, to which, however, we refer the Court. Syllabus three reads as follows:

"In the absence of fraud on their part and of fraudulent imposition of the officers of the United States Land Department their determination (Register and Receiver) in matters of fact relating to the entry of land cannot be reviewed by the Courts, but their determination upon questions of law may be."

As we have heretofore shown the gravamen of the plaintiff's bill is that upon alleged incompetent and irrelevant testimony, the certificate of entry of the plaintiff's predecessor was cancelled —but again, we will draw the Court's attention to the fact that we are not called upon to accept the unproved allegation of the plaintiff's bill that the evidence was "incompetent" or "irrelevant." It was incumbent upon them to aver and prove what their evidence *was*, which they did not do. As to whether the evidence was insufficient or not involves the determination of the question: "Was it sufficient to prove the facts at issue?" But as to that it was a question of fact, which it was within the exclusive competency, within the principles

above announced, of the Land Department to determine, and that department having made a finding it is not subject to a review here.

The late case of *Gonzalez* vs. *French*, 164 U. S., 338, reported also in the advance sheets of the opinions of the United States Supreme Courts by the Lawyer Co-operative Pub. Co. and decided November 30th, 1896, is still further definitive as to the law.

This was a case of the filing of an applicant for the entry of a piece of land having been rejected by the Register and Receiver. The syllabus is as follows:

"When a claim to public land has been passed upon by the proper local officer of the Land Department and upon appeal by the Commissioner of the General Land Office and upon further appeal by the Secretary of the Interior, and in pursuance of their decisions a patent has been granted for the land, a pre-emption claimant in order to recover the land from the patentee must aver and prove either that the Land Department erred in their construction of the law or that fraud was practiced upon its officers or that they themselves were charged with fraudulent practices."

In the body of the decision, page 96, we have the following:

"The Register and Receiver was therefore warranted in rejecting the claim of the plaintiff in error, and at any rate, as she did not appeal from their decision, *to the Commissioner of the General Land Office she must be deemed to have acquiesced therein and is precluded thereby so long as it remains unreversed.*"

RECOVERY OF PLAINTIFF PRECLUDED BY LACHES.

The entry of the predecessor of the California Redwood Company, in the case against Mahan, was cancelled on June 7, 1889; this action was commenced on the first day of December, 1894. being over five years before a step was taken by the plaintiff for the enforcement of its alleged rights. Their equity is stale.

In determining the extent and degree of laches which bar a recovery Federal Courts of equity are governed by analogy by the Statutes of Limitation of the State in which the action arose. The California period of limitation is five years. There is nothing in any of the circumstances of this case which warrants the Court in not applying this rule here.

Whenever a bill shows on its face a want of diligence, and whenever it shows, as these bills do, that the time has run to such an extent as would constitute a bar under the statutes of limitations, the bill then must be dismissed, unless reasons are alleged which will satisfactorily account for the delay in the institution of a suit.

In the case of *Landsdale* vs. *Smith*, 106 U. S., 391, this doctrine is again stated. The case of *Badger* vs. *Badger* is there cited. In that case the Court, speaking by Justice Grier, said: "that a party who makes an appeal to the conscience of the Chancellor should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights and the means used by the respondent to keep him in ignorance and how and when he first came by the knowledge of the matters alleged in his bill, otherwise the Chancellor

may justly refuse to consider his case on his own showing, without inquiry whether there is a demurrer or formal plea of the Statute of Limitation contained in the answer."

Book 27 of the L. Ed., U. S. Repts, page 219.

This principle is too familiar to justify any elaboration.

In these cases, all of the bills show that more than five years had elapsed after the cause of action accrued, viz., the cancellation of the entries, before anything had been done in the way of asserting the rights of the plaintiffs by action. There is nothing in the bill to excuse the delay—no explanation of what were "the impediments to an earlier prosecution of the claim"—no hint as to why the plaintiff slept so long on its rights. In this view of the matter, we ask what escape can there be from the ban of inexcusable laches? And while in our amended answer, we have set up this plea, under the authorities last above cited, it does not seem to have been necessary to have done that.

"A chancellor," in the language of the above decision, "without inquiry as to whether there is a demurrer or formal plea of the Statute of Limitations contained in the answer, will refuse to consider the case."

In the case of *Lang Syne M. Co.* vs. *Ross*, 20 Nev. 140, the Court, speaking by Judge Hawley, uses the following language:

"The Statutes of Limitation, where they are addressed to courts of equity, as well as to courts of law, as they seem to be in all cases of concurrent jurisdiction at law and in equity—to which they directly apply seem equally obligatory in each court.

It has been very justly observed that in such cases courts of equity do not act so much in analogy to the statutes as in obedience to them."

2 Storys Eq. Jur. 1520.
Norris vs. *Haggin*, 28 Fed. Rep. 278, and authorities there cited.
Hardy vs. *Harbin*, 4 Saw., 548.
Norton vs. *Meader*, *Id.* 615.

Material allegations of the Bill denied in the answer and unproved at the trial.

We will now call the attention of the Court to a number of allegations in the plaintiff's bill which stand unsupported by proof.

1. The allegation as to the citizenship and age of the entryman.

2. That the entryman has never made any other application under the Acts of Congress and did not apply to purchase the land on speculation, but in good faith for his own benefit, etc.

3. The posting by the Register in his office, for the period of sixty days, of the notice of the application.

4. That the notice was published for sixty days in a newspaper.

5. That no adverse claim was filed.

6. That the applicant furnished the Register with satisfactory evidence that the notice had been published for sixty days in a newspaper nearest to the location of the land.

7. That the land was chiefly valuable for timber.

8. That the cancellation was made without previous notice and without any trial or hearing and without legal or competent evidence.

9. That at the time of the conveyance to the plaintiff it was without knowledge or notice that the entrymen had been acting as a "dummy."

10. That at the time of the conveyance the entrymen claimed to be the legal owner, and that plaintiff received the conveyance in good faith, believing it to be entirely valid, regular, and honest.

None of the allegations above specified have been proved. They are material allegations, necessary to be proved in order to entitle the plaintiff to recover —if they had not been deemed to have been material they would not have been inserted in the complaint.

The judgment of the lower Court should be affirmed.

Respectfully submitted,

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S. V. COSTELLO,
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